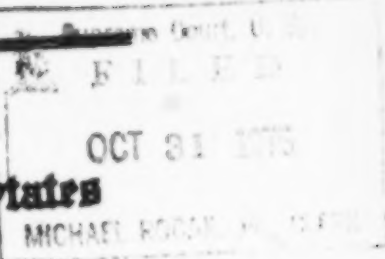


IN THE
Supreme Court of the United States

OCTOBER TERM, 1975

No. **75-648**



IN THE MATTER
OF
FRED G. MORITT,

Appellant,

-against-

EXTRAORDINARY SPECIAL AND TRIAL TERM OF THE
SUPREME COURT, COUNTY OF KINGS, HON. JOHN M.
MURTAGH, as Presiding Justice of the Extraordinary Special
and Trial Term, HON. MAURICE H. NADJARI, as Special
Deputy Attorney General, LOUIS J. LEFKOWITZ, Attorney
General of the State of New York,

Appellees.

On Appeal From The Supreme Court
Of The State Of New York, Appellate
Division, Second Judicial Department

JURISDICTIONAL STATEMENT

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OF
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EXTRAORDINARY SPECIAL AND TRIAL TERM OF THE
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Deputy Attorney General, LOUIS J. LEFKOWITZ, Attorney
General of the State of New York,

Appellees.

On Appeal from the Supreme Court of
The State of New York, Appellate
Division, Second Judicial Department

JURISDICTIONAL STATEMENT

Appellant appeals from the final judgment of the Supreme Court of the State of New York, Appellate Division, Second Judicial Department, entered December 27th, 1974, which dismissed on the merits a petition in a proceeding under Article 78 of the New York Civil Practice Law and Rules to prohibit the prosecution of appellant, and drawing into question the validity of Section 149 subd. 1 and 2 of the Judiciary Law of the State of New York, and Article 6, Sect. 27 of the New York State

Constitution, as repugnant to the Constitution of the United States.

An appeal therefrom taken as of right on constitutional grounds, to the Court of Appeals of the State of New York, was filed on January 9th, 1975, pursuant to Article 6, Sec 3(b) New York State Constitution, and New York Civil Practice Law and Rules 5601(b) (App B). On June 4th, 1975, the appeal was dismissed upon the stated ground that "no substantial constitutional question is directly involved" (App A).

On September 10, 1975, the said Court entered an order denying reargument thereon, and on the same date, entered an order denying appellant's application for permission to appeal from the final judgment of the Appellate Division aforesaid (App A).

No opinion was rendered either by the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, or by the New York Court of Appeals.

An amended notice of appeal was filed in the Appellate Division, Second Judicial Department, Supreme Court of the State of New York on September 29, 1975. (App A).

Appellant respectfully submits this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial federal constitutional questions are herein presented.

JURISDICTION

The jurisdiction of the Supreme Court to review this final judgment by direct appeal is conferred by Title 28 United States Code Sec. 1257(2).

The following decisions sustain the jurisdiction of the Supreme Court herein:

As to the separation of powers and independence of the judiciary: *United States v. Brown*, 381 U.S. 437 (1965);

O'Donohue v. United States, 289 U.S. 516, 513; *Dreyer v. Illinois*, 187 U.S. 71, 84; *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 633 (1952); *Kilbourn v. Thompson*, 103 U.S. 168, 190 (1880); *Springfield v. Philippine Islands*, 277 U.S. 189, 201 (1928); *Montana Co. v. St. Louis Mining & Co.*, 152 U.S. 160, 169 (1894); *In Re Murchison*, 349 U.S. 133 (1965); *People ex rel S.L. & T. Co. v. Extraordinary Term of the Supreme Court*, 220 N.Y. 487, 116 N.E. 384, per Judge Cardozo; *Matter of Reynolds v. Cropsey*, 241 N.Y. 389, 395, 150 N.E. 303; *Stuart v. Palmer*, 74 N.Y. 183, 189).

As to denial of procedural due process of law and the equal protection of the laws: *Long v. District Court of Iowa*, 385 U.S. 192; *Lane v. Brown*, 372 U.S. 477; *Douglas v. California*, 372 U.S. 353; *Gideon v. Wainwright*, 372 U.S. 335; *Griffin v. Illinois*, 351 U.S. 12; *Roller v. Holly*, 176 U.S. 398, 409; *Coe v. Armour*, 237 U.S. 413, 424-5; *Malinski v. New York*, 324 U.S. 401, 419; *Field v. Boyle*, 503 F.2d (CA 7, 1974); *Wong Young Sung v. McGrath*, 339 U.S. 33, 50 (1950); *Burgett v. Texas*, 389 U.S. 109 (1967).

As to the ex post facto prosecution: *Vick Wo v. Hopkins*, 118 U.S. 356, 373-4; *Watson v. Buck*, 313 U.S. 387; *Nashville C & St. L. Ry. v. Walters*, 294 U.S. 405; *Hill v. State of Texas*, 316 U.S. 400; *City of St. Petersburg v. Alsup*, 238 F. 2d 830, cert. den. 353 U.S. 922; *Williams v. United States*, 179 F2d 644, aff. 341 U.S. 70; *Love v. Fitzharris*, 460 F.2d 382, vacated 409 U.S. 1100; *Matter of Spindell*, New York Supreme Court (*New York Law Journal*, June 3, 1974).

Statutes Involved

The state statutes involved, set forth in the appendix, are as follows: Section 149, subd. 1 and 2, Judiciary Law of the State of New York; Article 6, Section 27 New York State Constitution; Section 63 Executive Law of the State of New York, as applied; Article 6, Sec. 28 New York State Constitution; Section 212 Judiciary Law of the State of New York, as applied.

Questions Presented

1. Is a state statute and constitutional provision, authorizing the governor to create and appoint an extraordinary term of the supreme court and to designate the special justice who shall preside therein—and further empowering the governor to terminate the assignment of such justice at will, and at any time, and to designate another justice in his place—facially violative of the independence of the judiciary and the Separation of Powers guaranteed against encroachment by the 5th and 14th Amendments of the Constitution?

2. Is a state statute which substantially diminishes the substantive procedural rights of all litigants in the appellee Extraordinary Term Court, by requiring that all preliminary motions and pre-trial proceedings be brought exclusively in such court, before a judge specially designated by the Governor, and summarily removable at the will, whim or caprice of the Governor, and which further prescribes that in the alternative, in the exercise of discretion by a justice of the appellate division of the Supreme Court, such pre-trial motions may be entertained by the appellate division, facially violative of the equal protection of the laws guaranteed under the 5th and 14th amendments of the Constitution, as compared to the unrestricted pre-trial procedural rights accorded all other litigants in the regular criminal terms of the Supreme Court?

3. Where a state statute expressly requires that the independently-elected constitutional office of the Attorney General of the State of New York appear in person, or by one of his deputies, before the Extraordinary Term of the Supreme Court to manage and conduct all proceedings therein, may the Governor constitutionally dictate the choice and personally designate a special prosecutor to manage and conduct all proceedings in the appellee Extraordinary Term of the Supreme Court, particularly where the presiding justice thereof was likewise personally designated by and was summarily removable at will by the Governor?

4. Is a state prosecution void as *ex post facto*, where it intrudes into the special relationship and personnel practices between a judge and his lawfully appointed personal assistant exclusively within the jurisdiction, domain and supervision of the administrative board of the state's unified court system, as specifically mandated by the state statute and the New York State Constitution, upon which appellant and all other judges within the state's unified court system have traditionally relied?

Statement

On September 19th, 1972, the Governor of the State of New York issued Executive Order No. 58 (App. B), (9 Official New York Codes, Rules and Regulations, Sec. 1.58) pursuant to the authorization of Section 149 of the Judiciary Law of the State of New York and Article 6, Section 27 of the New York State Constitution, and Section 63 of the Executive Law of the State of New York, establishing an extraordinary special and trial term of the Supreme Court in and for the County of Kings of the State of New York, requiring the selection of a special grand jury for said term, and directing the appellee Attorney General of the State of New York, in person or by one of his deputies, to investigate and prosecute all corrupt acts committed by public servants arising out of, relating to or in any way connected with the enforcement of law or administration of criminal justice in the City of New York." (App. B)

On October 13th, 1972, the Governor issued Executive Order 64 (App. B) (9 N.Y.C.R.R. 1.64), designating and appointing the appellee Hon. John M. Murtagh, a Justice of the Supreme Court of the State of New York, to preside over the Extraordinary Special and Trial Term for the County of Kings and to cause to be drawn a jury to serve the said Term (App. B).

Appellant was a Judge of the Civil Court of the City of New York, having served since 1957 as a member of that Court. His law secretary, officially designated as a personal assistant, was one Theodore Mann, a duly qualified attorney at law, who was appointed on September 1, 1972.

On April 17, 1974, appellee Nadjari filed an indictment in the Extraordinary Special and Trial Term of the Supreme Court, County of Kings, charging appellant with the alleged crimes of conspiracy in the third degree, grand larceny in the second degree, perjury in the first degree and tampering with a witness.

In substance, the conspiracy and grand larceny counts, of which Mr. Mann was separately indicted, was that the latter had "performed little or no work" as law secretary to Judge Moritt from September 18, 1972 to January 24, 1974. The documented facts, however, are that Mr. Mann had regularly performed his duties as law secretary throughout; that in the last week of September 1973, Mr. Mann had been forced to leave for Florida to attend his seriously ill wife who had suffered a paralytic stroke; that appellant Judge Moritt had expressly granted him permission to do so in view of the fact that Mr. Mann had worked during the summer of July and August 1973, while Judge Moritt was on a European holiday, and elected to take his vacation in the Fall of that year.

Under the laws of New York, all personnel practices, including appointments, discharges, leaves of absence, sick leaves, vacation and time allowances, etc., of all non-judicial personnel of New York's unified court system are exclusively controlled and regulated, and are within the sole jurisdiction of the administrative board of the Judicial Conference of the State of New York (Article VI, Sect. 28 of the Constitution of the State of New York; Section 212 Judiciary Law, subd. 1 (App. B)).

The conclusive fact is that no rule, regulation or order had been promulgated by the administrative board which did in any way restrict the total and exclusive supervision exercised by the judges over the personnel practices of their law secretaries or clerks within the unified court system of the State of New York. "For the nature of the Secretary's work is wholly defined by the individual Justice, and is to a large extent unrelated to a five-day per week, eight-hour schedule. The Secretary may be as much on the job when at home, actually ill, but reading and evaluating briefs, papers in the court file, decisions and precedents, or

conferring with the Justice by telephone, as when he is physically present in chambers." (*Matter of Spindel v. Dudley*, Supreme Court, New York County, New York Law Journal, June 4, 1974).

As to the baseless perjury and tampering counts, relating to a statement purportedly made by Judge Moritt to Mr. Mann's law clerk, that "defendant swore falsely when he testified that he had at no time told anyone that he knew the names of a half-dozen Judges' secretaries who never report to work", the fact is that it would have been physically impossible for Judge Moritt to have known of his own knowledge whether other judges' secretaries "never report to work." Moreover, no proper foundation had been laid therefor before the grand jury and Judge Moritt's testimony had been wrongfully elicited for the sole purpose of laying the groundwork for a "perjury" prosecution rather than to discover the truth (*Bronston v. United States*, 409 US 352; *United States v. Lardieri*, 497 F.2d 317).

Subsequent to the filing of the indictment, on July 3rd, 1974, pursuant to Section 149, subd 1, Judiciary Law (App. B) appellant was granted the discretionary permission of a Justice of the Appellate Division of the Supreme Court to apply to that Court for pre-trial relief to dismiss the indictment on several constitutional and jurisdictional grounds. Among the relief requested was a motion to dismiss the indictment on the ground of the prosecutorial misconduct of appellee Nadjari in suppressing vital and material evidence before the grand jury which would have completely exonerated appellant of the unfounded charges contained in the indictment. In addition, appellant moved to dismiss the indictment on the ground that the evidence adduced before the grand jury did not constitute a crime.

On November 12th, 1974, the Appellate Division denied the appellant's original application for pre-trial relief, including the aforesaid motions to dismiss the indictment. No oral argument was permitted by the Court although duly requested by appellant. (*Matter of Moritt v. Nadjari*, 46 App. Div. 2d 784 (NY 1974). In its opinion, the Court stated in part:

"In connection with the substantive attack made on the various counts of the indictment, we have examined the Grand Jury minutes. While the theory underlying the charge of grand larceny is thin and the proof in regard thereto quite tenuous, they are nevertheless sufficient to require a denial of the defendant's motion to dismiss.

We have considered the other contentions raised by the defendant and find them to be without merit."

The said order of the Appellate Division was not appealable under New York law.

On November 27th, 1974, appellant moved for re-argument upon the specific ground that the denial on the merits of appellant's petition to dismiss the indictment for gross prosecutorial misconduct, *without a full-scale factual hearing*, and without opportunity to argue, was violative of his right to due process of law, and to the equal protection of the laws. (*Westervelt v. Gregg*, 12 N.Y. 2d 202; *Wong Yong Sung v. McGrath*, 339 U.S. 33; *Burgett v. Texas*, 389 U.S. 109). On December 27th, 1974, the Appellate Division denied re-argument.*

Subsequently, during the pendency of appellant's case before the Extraordinary Term of the Supreme Court, appellant moved the Appellate Division to amend its original order of November 12th, 1974, so as to provide that the denial on the merits, without a hearing, of his motion to dismiss the indictment in that

* Though the Appellate Division had denied appellant's application to dismiss the indictment for gross prosecutorial misconduct shocking to the conscience, without a hearing, a complaint subsequently filed by Judge Moritt under Title 42 USC 1983 for deprivation of civil rights, pleading the identical acts alleged in the state court proceedings hereinabove, was upheld by Chief Judge Mishler in the U.S. District Court for the Eastern District of New York, on Appellee Nadjari's motion to dismiss. (*Moritt v. Nadjari, et al.* ___ F. Supp. ___ August 27, 1975).

Court, be "without prejudice to re-consideration and renewal thereof by the Extraordinary Special and Trial Term of the Supreme Court". On May 14th, 1975, the Appellate Division denied appellant's application to amend.

Subsequently, on January 15, 1975, the Appellate Division denied appellant's motion for renewal and reconsideration of his motions to dismiss the indictment, filed upon the specific documented ground that appellee Nadjari had publicly acknowledged on December 18, 1974 that the employment by a judge of an alleged "no-show" law secretary "did not constitute an indictable crime", and that "we need new legislation for that."

Subsequently, as required by the Criminal Procedure Law of New York, Sec. 255.20, appellant filed a series of omnibus motions in the Extraordinary Term of the Supreme Court as follows: To dismiss the indictment on the ground that Section 149 of the Judiciary Law is inherently void on its face, and Section 63 of the Executive Law, as applied, under the Due Process clause of the Constitution; to dismiss the indictment in the interest of justice for gross prosecutorial misconduct shocking to the conscience violative of due process of law; to dismiss the indictment as unconstitutionally *ex post facto* and selectively discriminatory in nature under the Due Process Clause of the Constitution; to stay all proceedings pending final determination of the constitutional issues raised herein.

Subsequent to the original proceeding instituted in the Appellate Division under Sec. 149 of the Judiciary Law, as aforesaid, on November 25th, 1974, appellant instituted a special proceeding in the Appellate Division, Second Judicial Department, of the Supreme Court of the State of New York, for an order under Article 78 of the Civil Practice Law and Rules, to prohibit the appellees from proceeding with the trial of the indictment, and for dismissal of the indictment under the 5th and 14th Amendments of the Constitution of the United States.

and Article 1, Sec. 6 of the New York State Constitution, upon the following grounds:*

1. That the statute under and by which the appellee Extraordinary Special and Trial Term of the Supreme Court was convened, to wit, *Sec. 149, subd. 1 of the Judiciary Law of New York*, is unconstitutional and void on its face, as inherently violative of the independence of the judiciary and the Separation of Powers guaranteed against encroachment by the Due Process Clause of the federal and state constitutions.

2. That the same statute, *Sec. 149 of the Judiciary Law of New York, subd. 2 thereof*, is unconstitutional and void on its face, as inherently violative of appellant's right to procedural due process and to the equal protection of the laws under the Constitution.

3. That the appellee Nadjari, unconstitutionally misapplied the state's penal laws by illegally usurping the exclusive jurisdiction vested in the administrative board of the Judicial Conference of the State of New York over the administrative supervision of the unified court system, as provided in Article 6, Sec. 28 of the New York State Constitution, and Section 212 of the Judiciary Law of the State of New York, rendering the indictment against appellant invalidly retroactive, in violation of the 5th and 14th Amendments and Article I, Sec. 9 of the Constitution of the United States forbidding *ex post facto* enforcement of the criminal laws.**

* Under New York Law, an Article 78 proceeding is an appropriate vehicle for contesting state action on jurisdictional or constitutional grounds (*Matter of Hogan v. Court of General Sessions*, 296 NY 1, 8; *People ex rel, SL & T Co. v. Extraordinary Term of Supreme Court* 220 NY 487; *Matter of Reynolds v. Cropsey*, 241 NY 389; *Kovarsky v. Housing & Development*, 31 NY2d 184, 286 N.E.2d 882; *Dunn & Bradstreet, Inc., v. City of New York*, 276 NY 198, 11 N.E.2d 728; *Socha v. Smith*, 24 NY 2d 400; *Civil Practice Law and Rules, Article 78* (McKinney's Consolidated Laws of New York, Book 7B).

** The petition further contended therein that the appellee Nadjari usurped jurisdiction in that his authority to act was strictly limited to

The Article 78 proceeding aforesaid was instituted in the Appellate Division as an original proceeding by mandate of New York's Civil Practice Law and Rules, Section 506(b)(1), which requires that an Article 78 proceeding against a respondent Justice of the Supreme Court must be initially instituted in the Appellate Division, rather than in the State Supreme Court.

In support of the petition, appellant submitted a memorandum of law, in opposition thereto, appellee Nadjari submitted a brief two-line affidavit and a memorandum of law on behalf of the respondents named in the petition. The respondents' affidavit merely stated: "Under the facts and circumstances of the case at bar the relief sought is unavailable to the petitioner."

Again, no oral argument was permitted on appellant's Article 78 petition.

In dismissing the petition "on the merits," the Appellate Division rendered no opinion. (App. B).

The Federal Questions are Substantial.

I.

The state statute in issue, Section 149 subd. 1, of the Judiciary Law, and its counterpart, Article 6, Sec. 27 of the New York State Constitution, are on their very face, fundamentally violative of the independence of the judiciary and of the Separation of Powers guaranteed against encroachment by the 5th and 14th Amendments of the Constitution.

In no other instance under the Judiciary Law of the State of

the criminal justice system in the City of New York, by the requirements contained in the Governor's Executive Order, and that the acts charged against appellant were in no way connected with the criminal justice system or the enforcement of law. The construction of a state statute is not reviewable in this court (*Guaranty Trust Co. v. Blodgett*, 287 U.S. 509).

New York is the Governor granted the power to assign and remove a member of the judiciary, even during the same term. In every instance, the judicial prerogative of regular and temporary assignments of Justices to the Supreme Court is vested exclusively in the Appellate Division of the Supreme Court. (Article 6, Sec. 26 New York State Constitution, and Sec. 86-88 incl. Judiciary Law (App. B).

A statute that empowers the Governor to terminate at will the assignment of a judge to preside over a term of court, for any or no reason whatsoever, at any time, unlike the sole and exclusive power vested in the judicial conference to regulate the assignment and replacement of all justices in all other courts, unconstitutionally places the "whole power" of the executive over the independence and tenure of the judiciary. (*Dreyer v. Illinois*, 187 U.S. 71, 84; *People ex rel S.L. & T. Co. v. Extraordinary and Trial Term of the Supreme Court*, 220 NY 487; *Matter of Reynolds v. Cropsey*, 241 NY 389, 395).

A state constitution, no less than a statute, can be attacked for unconstitutionality (*American Federation of Labor v. Watson*, 327 U.S. 582, 592-93; *Driskell v. Edwards*, 518 F.2d 890 (CA 5, 1975); *Matter of Wendell v. Lavin*, 246 NY 115, 123; *People ex rel Jackson v. Potter*, 47 NY 375, 379-380).

The fatal flaw of the statute and constitutional provision in issue is not that the Governor had overtly intruded upon the independence of the judiciary by actual replacement of the appellee presiding judge to do the Governor's bidding, but that in its in-built potential of autocratic control by the Governor inherent in the pervasive power of summary removal of any judge appointed by him, the statute is rendered unconstitutional per se. The very latent power of the Governor to hire and fire a judge puts the executive branch of government implacably "in control of judicial action" (*People ex rel S.L. & T. Co. v. Extraordinary Term*, 220 N.Y. 487, 116 N.E. 384).

In constitutional principle, the constitutionality of a measure depends not on the degree of its exercise, but on its principle (*Providence Bank v. Billings*, 29 U.S. 514). "The constitutional

validity of laws is to be tested, not by what has been done, under it, but by what may, by its authority, be done", (*Stuart v. Palmer*, 74 N.Y. 183, 189; quoted with approval in *Montana Co. v. St. Louis Mining & Co.*, 152 US 160, 169 (1894); *Farmer Grain Co. v. Langer*, 273 F. Rep. 635, 647 (CA 8, 1921).

It matters not that the unfettered power thus vested in the Governor springs from the highest motives in the rooting out of a festering corruption within the criminal justice system. "Even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." (*NAACP v. Alabama*, 377 U.S. 288, 307).

That this question is so substantial as to require plenary consideration by the Supreme Court of the United States for its resolution is readily attested by the fact that the state statute in issue is an identical replica of the tyrannical power exercised by King George III over the colonial governments, through his royal governors, by systematically appointing and controlling his own judges and prosecutors. "He has made Judges dependent on his Will alone, for the tenure of their offices, ****" (*Declaration of Independence*, July 4, 1776).

The doctrine of Separation of Powers in our constitutional system of government by checks and balances is a "bulwark against tyranny" (*United States v. Brown*, 381 U.S. 437). "**** there is no liberty, if the power of judging be not separated from the legislative and executive powers". (*The Federalist*, No. 78, A. Hamilton, Modern Library ed. P 504). "Upon the state courts, equally with the courts of the Union, rests the obligation to guard and enforce every right secured by the Constitution." (*Holohan v. United States*, 294 U.S. at p. 113). "**** due process questions under the Federal Constitution may be presented either by the failure of a state to follow its own rules of law or by state rules of law themselves serving as a deprivation of due process." (*Field v. Boyle*, 503 F.2d 774 (CA 7, en banc, 1974).

"A fair trial in a fair tribunal is a basic requirement of due

process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness." (*In Re Murchison*, 349 U.S. 133) "*** every procedure which would offer a possible temptation to the average man as a judge. . . . not to hold the balance nice, clear and true between the state and the accused, denies the latter due process of law" (*Tumey v. Ohio*, 273 U.S. 510).

"The disciplined judicial mind should not be subjected to any unnecessary strain; even the most austere intellect has a sub-conscious." (*United States v. Walker*, 473 Fed. 2d 136, (CA, DC, 1972).

In dismissing the appeal taken as of right under New York law pursuant to Civil Practice Law and Rules 5601(b), on the purported ground that "no substantial constitutional question is directly involved" and in summarily denying the appellant leave to appeal, the Court of Appeals failed to adhere to its standard precedents laid down in its own prior decisions in *People ex rel S.L. & T. Co. v. Extraordinary Term of the Supreme Court*, *supra*, Cardozo, J. and in *Matter of Reynolds v. Cropsey*, *supra*, construing the very statute here in issue in its preamended form. It was after the Cardozo decision in *Saranac* that the legislature made the statute repugnant to the Constitution by enacting new legislation allowing the Governor to remove as well as appoint the special judge of the Governor's own creation. As so reconstituted, it is self-evident that the legislative authorization granted to the Governor to terminate the assignment of a justice appointed by him at will, would never have survived constitutional muster of the Cardozo court.

With all due deference and the utmost respect for the New York Court of Appeals, a state court cannot so construe a state statute as to render it obnoxious to the Federal Constitution. (*Arizona Employer Liability Cases*, 250 US 400; *Crew Levick Co. v. Comm. of Pa.*, 245 US 292). The Supreme Court of the United States is not bound by the determination of the New York Court of Appeals that the constitutional questions are not

substantial, but must reach a conclusion independent of the state court. (*Appleby v. City of New York*, 271 U.S. 364; *Napue v. Illinois*, 360 US 264; *Brookhart v. Janis*, 86 S. Ct. 1245; *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697).

II

In substantially diminishing the rights of litigants before the Extraordinary Term, as compared to all other criminal defendants of the regular criminal terms of the Supreme Court of the State of New York, Sec. 149 subd 2 Judiciary Law is, likewise, facially violative of the equal protection of the laws guaranteed by the 5th and 14th Amendments of the Constitution. (*Hill v. State of Texas*, 316 U.S. 400).

By mandating that all defendants must apply exclusively to the Extraordinary Special and Trial Term of the Supreme Court with respect to all critical preliminary motions and pre-trial proceedings, the appellant and all other similarly situated have been selectively deprived of fundamental procedural rights flagrantly violative of due process of law and have been irreparably injured thereby. By amending the statute subsequent to the decision in *People ex rel SL & T Co.*, and in *Reynolds v. Cropsey*, *supra*,—which had previously construed and had upheld this very identical statute, in its preamended form, as one which did not "diminish the rights of litigants", and further holding that "it is a term of the Supreme Court with the same jurisdiction that belongs to any other term."—the statute was rendered repugnant to the due process clause of the Constitution.

Above all, in stark contrast to all other litigants in the regular criminal terms of the Supreme Court, who are sanctioned to bring all pre-trial motions and proceedings before a separate and independent Justice presiding at Criminal Term, the appellant and all others similarly circumstanced at the bar of the appellee Court are severely restricted by the limitations contained in Sec. 149, subd. 2 of the Judiciary Law (App. B) requiring that all

such motions be made returnable in the Extraordinary Term alone.

Among these vital pre-trial proceedings are motions for suppression hearings, change of venue, disqualification of the presiding judge for bias; motions to dismiss an indictment for insufficiency of evidence, denial of speedy trials or on various other procedural, jurisdictional and constitutional grounds. Especially applicable to appellant is a motion to dismiss the indictment in the interest of justice for prosecutorial misconduct shocking to the conscience, and for a hearing thereon, as provided by Article 210 New York Criminal Procedure Law. All other litigants in the criminal terms have the absolute right to a determination of pre-trial proceedings by a Judge regularly assigned by the Appellate Division, rather than by a judge personally hand-picked by the Governor, instantly replaceable by Executive fiat even within the same term.

Again, in sharp contrast to the fixed general rule in the Appellate Division that "a motion or proceeding will be deemed submitted to the court without oral argument", all other defendants at the bar of the regular criminal terms of the Supreme Court are by court rule granted the important right to argue orally all contested motions. (Rules Sec. 670.3(b) Supreme Court Rules Kings County, 22 NYCRR, Sec. 752.11. Here, appellant had been denied a fair and equal opportunity to argue his original motion to that Court submitted under color of Section 149 subd. 2 of the Judiciary Law.

It will be noted that even in a meritorious application to disqualify the presiding justice for bias or interest, there would be no other justice to take his place, for there is but a single judge appointed by the Executive to preside in the Appellee Court, the Extraordinary Term of the Supreme Court. To replace that justice for bias or interest would necessarily entail that the Governor designate an alternate judge in his place by new executive order in each such case, thus superimposing a serious practical road block in the path of any defendant at the bar of the Extraordinary Term, to the equal protection of the

laws, as compared to all other defendants within the jurisdiction of the regular criminal terms of the Supreme Court.

As to the alternate discretionary right of any defendant to apply to the Appellate Division for permission to file a pre-trial motion or proceeding, authorized by Sec. 149 Judiciary Law, subd 2, it is hornbook constitutional law that a grant of discretion is no fair or adequate substitute for the absolute right accorded all other defendants in the regular criminal terms to institute all pre-trial proceedings at an independent term. "The right of a citizen to due process of law must rest upon a basis more substantial than favor or discretion" (*Roller v. Holly*, 176 U.S. 398, 409).

Even on the trial level, the fundamental right to waive a jury trial and to submit the critical issues of guilt or innocence to the trial judge as trier of the facts as well as the law, has been seriously compromised in a court so unconstitutionally structured as to tilt the balance against appellant, and all other similarly situated.

Graphically illustrative is this very case where the Appellate Division has already determined from inspection of the grand jury minutes that "the theory underlying the charge of grand larceny is thin, and the proof in regard thereto quite tenuous."

With the utmost deference and respect for the esteemed appellee Judge John M. Murtagh, the special warrantability of waiver of jury trial here present would be contraindicated, nonetheless, under the unique situation engendered by the subtle pressures of interest flowing from the unconstitutional statute at bar. "The history of American freedom is in no small measure the history of procedure." (*Malinski v. New York*, 324 U.S. 401, 419)

III

The Governor's personal designation of appellee Nadjari to manage and conduct all proceedings in the Extraordinary Term,

particularly in a court where the presiding justice had been likewise personally designated and appointed by the Governor, rendered Section 63 of the Executive Law and Executive Order No. 58, issued thereunder, unconstitutional and void, as applied.

The personal designation of the prosecutor by the Governor infinitely compounded the threat against the independence of the judiciary, by arrogating unto the Executive, likewise, the constitutional functions of the quasi-judicial, independently-elected office of appellee Attorney General of the State of New York (Article 5, Sec. 1 New York State Constitution), and flagrantly violated the specific mandate of Section 63 of the Executive Law of New York that the Attorney General "attend in person, or by one of his deputies" before the Extraordinary Term.

It is no mere coincidence that, under goad of a court structure so wholly controlled by the Executive, that an abnormal number of defendants at the bar of the appellee court have been compelled to interpose special defenses charging appellee Nadjari with wilful entrapment, subornation of perjury, prosecutorial misconduct shocking to the conscience, refusal to arraign defendants at any time following arrests, and notoriously unfair trial tactics. (See *United States v. Archer*, 486 F.2d 670 (CA2); *People v. Steinman*, 44 App. Div. 2d 839 (2d Dept. 1974); *Matter of Klein v. Murtagh*, 44 App. Div. 2d 465 (2d Dept. 1974); *In People v. Rao*, 46 App. Div. 2d 343 (2d Dept. 1975), the Court unequivocally remarked of appellee Nadjari: "Such a perversion of the criminal justice system by an overzealous prosecutor is illegal, outrageous and intolerable and we condemn it." Confirmatory thereof, federal Judge McMahon recently characterized appellee Nadjari's mispractices as "foul, illegal and outrageous." (*Rao v. Nadjari*, — F Supp —, USDC, SD N.Y. (October 2, 1975).

The source and fount of appellee Nadjari's gross prosecutorial misconduct practiced in the case at bar—including, among other elements, the wilful and deliberate suppression of vital

exculpatory evidence before the grand jury, and an illegal arrest without probable cause—stems, seed and root, from the Governor's personal control and direction over the judicial machinery of the Extraordinary Term court, under the presumed authority of Sections 149 subds 1 and 2, Judiciary Law and Section 63 Executive Law as applied. By every rule of logic, these unconstitutional statutes have inevitably tended to invite, provoke and condone the very outrageous practices manifested here and in a host of other cases, as reflected in a proliferating number of reported decisions. A statute may be deemed unconstitutional as applied (*Steffel v. Thompson*, 415 U.S. 452, ff. 7 (1974); *Watson v. Buck*, 313 U.S. 387); *Comm. of Mass. v. Mellon*, 262 US 447).

IV

To permit a prosecutor to engage in an *ex post facto* prosecution of this nature would directly undermine the fundamental independence of the judiciary with respect to the traditional official relationship subsisting between a judge and his law assistant in the regular performance of judicial duties, upon which this appellant and all other judges in the unified court system have relied. If this appellant be rendered retroactively vulnerable to the harassment and threat of a criminal prosecution over a matter strictly within the exclusive jurisdiction of the judiciary, then every judge or his law assistant in the land could be no less in jeopardy at the hands of a wilful and malicious prosecutor. Every judge and his law assistant would be hostage to the design of an ambitious, overzealous or tyrannical prosecutor. A state cannot, by judicial decision or otherwise, remove any of its activities from the inhibitions of the 14th Amendment. (*City of St. Petersburg v. Alsup*, 238 F.2d 830, cert. den. 353 US 922).

A law that makes an action done before its enactment criminal, and which was innocent when done, is *ex post facto*. *Calder v. Bull*, 3 U.S. 386 (1798); *Bouie v. Columbia*, 378 U.S.

347, 353 (1964); *United States v. Nill*, 518 F.2d 793 CA 5, 1975). The criminal statutes of grand larceny and conspiracy, as here applied against appellant, are clearly invalidly retroactive and an *ex post facto* exercise of jurisdiction. *Williams v. United States*, 179 F.2d 644, aff. 341 US 70; *Love v. Fitzharris*, 460 F.2d 382, vacated 409 US 1100).

**** Due process questions under the Federal Constitution may be presented either by the failure of a state to follow its own rules of law or by state rules of law themselves serving as a deprivation of due process". (*Field v. Boyle*, 503 F. 2d 774 (CA 7, 1974).

V.

The judgment appealed from herein is a final judgment within the meaning of 28 U.S.C. 1257 (*Gospel Army v. Los Angeles*, 331 U.S. 543, 548; *Dept. of Banking v. Pink*, 317 U.S. 264, 268; *Richfield Oil Corp. v. State Board*, 329 U.S. 69, 72).

Notwithstanding that the constitutional validity of the state statutes here in issue are now technically pending before the appellees Judge Murtagh and his Extraordinary Term of the Supreme Court as aforesaid, it is plain that appellant's contentions as to the facial invalidity of Section 149 Judiciary Law go to the very jurisdiction of the unconstitutionally structured Court. If this statute is inherently violative of the independence of the judiciary, then the appellee Court is utterly without jurisdiction or legal competence to resolve the issue of constitutionality or otherwise as a legally constituted Court (*Oakley v. Aspinwall*, 3 N.Y. 547; *Wilcox v. Royal Arcanum*, 210 N.Y. 370, 377; *People v. Whitridge*, 144 App. Div. 493 (N.Y. 1st Dept). The one and only Court properly exercising jurisdiction or legal capacity was the Appellate Division of the Supreme Court below, to which appellant had vainly addressed the proceeding appealed from herein.

In practical terms as well, it would be patently incongruous to beseech the appellees Judge Murtagh and Extraordinary Term

of the Supreme Court for a ruling which would enseat the invalidity of the Court's own very existence, and pronounce its own nullity as a legally constituted court; "There can, of course, be no valid prosecution and conviction for crime unless the court in which the prosecution is instituted or carried on is legally created and constituted, or is at least a de facto court." (22 *Corpus Juris Secundum* 108, pp. 299-300).

CONCLUSION

It is respectfully submitted that the constitutional questions presented by this appeal are so substantial and are of such grave public importance as to require plenary consideration with Briefs on the merits and oral argument, for their resolution.

Respectfully submitted,

AARON NUSSBAUM
Counsel for Appellant
Office & P.O. Address
16 Court Street—Suite 1505
Brooklyn, New York 11241

October 21, 1975.

I. EDWARD POGODA
Of Counsel
Office & P.O. Address
50 Court Street
Brooklyn, New York 11201

Appendix

**APPENDIX A
AMENDED NOTICE OF APPEAL**

**APPELLATE DIVISION
SECOND JUDICIAL DEPARTMENT
SUPREME COURT OF THE STATE OF NEW YORK**

In the Matter of
FRED G. MORITT,

Appellant

-against-

EXTRAORDINARY SPECIAL AND TRIAL TERM
OF THE SUPREME COURT, COUNTY OF KINGS,
HON. JOHN M. MURTAGH, AS PRESIDING
JUSTICE OF THE EXTRAORDINARY SPECIAL
AND TRIAL TERM, HON. MAURICE H. NADJARI,
AS SPECIAL DEPUTY ATTORNEY GENERAL,
LOUIS J. LEFKOWITZ, ATTORNEY GENERAL OF
THE STATE OF NEW YORK

Notice is hereby given that Fred G. Moritt, appellant herein, hereby appeals to the Supreme Court of the United States from the final judgment of the Appellate Division, Second Judicial Department, Supreme Court of the State of New York, entered December 27, 1974, which dismissed on the merits the petition of the appellant drawing into question the validity of a state statute on the ground of its being repugnant to the Constitution of the United States; and from the final order and judgment of the Court of Appeals of the State of New York, entered June 4, 1975 dismissing the appeal therefrom, and from the final order and judgment of the Court of Appeals entered September 10,

1975 denying leave to appeal therefrom.

This appeal is taken pursuant to 28 USC Section 1257(2).

Dated: September 29, 1975

s/Aaron Nussbaum
AARON NUSSBAUM
Attorney for Appellant
Office & P.O. Address:
16 Court Street
Brooklyn, N.Y. 11241

TO: HON. MAURICE H. NADJARI
Special Deputy Attorney General
2 World Trade Center
New York, N.Y. 10047

HON. LOUIS J. LEFKOWITZ
Attorney General of the State of New York
2 World Trade Center
New York, New York 10047

HON. JOHN M. MURTAGH
Presiding Justice,
Extraordinary Special and Trial Term
of the Supreme Court
100 Centre Street
New York, New York 10013

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of September, 1975, copies of the within Amended Notice of Appeal were mailed, postage prepaid, to the foregoing parties to their respective addresses herein above set forth.

All parties required to be served have been served.

Dated this 29th day of
September, 1975

s/Aaron Nussbaum
AARON NUSSBAUM
Attorney for Appellant

**APPENDIX A
NOTICE OF APPEAL**

(TITLE)

**NOTICE OF APPEAL
TO
THE SUPREME COURT OF THE UNITED STATES**

Notice is hereby given that Fred G. Moritt, petitioner-appellant herein, hereby appeals to the Supreme Court of the United States from the final judgment of the Court of Appeals of the State of New York entered September 10, 1975, denying leave to appeal to the Court of Appeals from the final judgment of the Appellate Division, Second Judicial Department of the Supreme Court of the State of New York entered December 27, 1974, which dismissed on the merits the petition of the petitioner-appellant in the Appellate Division herein drawing into question the validity of a state statute on the ground of its being repugnant to the Constitution of the United States.

This appeal is taken pursuant to 28 USC Section 1257 (2).

Dated this 25th day
of September, 1975

s/Aaron Nussbaum
AARON NUSSBAUM
Attorney for petitioner-
appellant

CERTIFICATE OF SERVICE

I hereby certify that this 25th day of September, 1975, copies of the within Notice of Appeal were mailed, postage prepaid, to their respective addresses herein above set forth.

HON. MAURICE H. NADJARI
Special Deputy Attorney General
Attorney for Appellee-Respondents, pro se
and Extraordinary Special and Trial Term
of the Supreme Court
2 World Trade Center
New York, N.Y. 10047

HON. LOUIS J. LEFKOWITZ
Attorney General of the State of New York
2 World Trade Center
New York, N.Y. 10047

HON. JOHN M. MURTAGH
Presiding Justice
Extraordinary Special and Trial Term
of the Supreme Court
100 Centre Street
New York, N.Y. 10013

s/Aaron Nussbaum
AARON NUSSBAUM
Attorney for petitioner-
appellant

Dated this 25th day of
September, 1975

**APPENDIX A
JUDGMENT OF APPELLATE DIVISION
SECOND DEPT.,
SUPREME COURT OF THE STATE OF NEW YORK**

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on December 27, 1974

HON. FRANK A. GULOTTA, Presiding Justice
HON. J. IRWIN SHAPIRO
HON. MARCUS G. CHRIST
HON. ARTHUR D. BRENNAN
HON. FRED J. MUNDER Associate Justices

(SAME TITLE)

A proceeding having been instituted in this court, pursuant to article 78 of the CPLR, by the above named Fred G. Morritt, petitioner in this proceeding, (1) to prohibit respondents from proceeding with trial of indictment No. S.P.O.K.—13/1974 and (2) to dismiss the indictment:

Now, upon the papers filed in support of and in opposition to the application, and the application having been duly submitted and due deliberation having been had thereon, it is

ORDERED that the application is hereby denied and proceeding dismissed on the merits, without costs.

Enter:

Irving N. Selkin
Clerk for the Appellate Division

**APPENDIX A
ORDER OF NEW YORK COURT OF APPEALS
DISMISSING APPEAL**

At a Session of the Court, held at Court of Appeals Hall in the City of Albany on the Fourth Day of June, A.D. 1975.

PRESENT, HON. CHARLES D. BREITEL
Chief Judge, presiding.

(SAME TITLE)

A motion having heretofore been made herein upon the part of the respondents to dismiss the appeal taken by the appellant in the above cause to this Court and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is granted and the appeal dismissed, without costs, upon the ground that no substantial constitutional question is directly involved (CPLR 5601[b][1]).

s/Joseph W. Bellacosa
Clerk of the Court

**APPENDIX A
ORDER OF COURT OF APPEALS
DENYING REARGUMENT**

At a session of the Court, held at Court of Appeals Hall
in the City of Albany on the Tenth Day of September
A.D. 1975

PRESENT, HON. CHARLES D. BREITEL
Chief Judge, Presiding

(SAME TITLE)

A motion for reargument of a motion to dismiss the appeal
taken as of right to the Court of Appeals in the above cause
having been heretofore made upon the part of the appellant
herein and papers having been duly submitted thereon and due
deliberation thereupon had:

ORDERED, that the said motion be and the same hereby is
denied.

s/Joseph W. Bellacosa
Clerk of the Court

**APPENDIX A
ORDER OF NEW YORK COURT OF APPEALS
DENYING LEAVE TO APPEAL**

At a session of the Court, held at Court of Appeals Hall
in the City of Albany on the Tenth day of September
A.D. 1975

PRESENT, HON. CHARLES D. BREITEL,
Chief Judge, presiding

(SAME TITLE)

A motion for leave to appeal to the Court of Appeals in the
above cause having been heretofore made upon the part of the
appellant herein and papers having been duly submitted thereon
and due deliberation thereupon had:

ORDERED, that the said motion be and the same hereby is
denied.

/s/ Joseph W. Bellacosa
Clerk of the Court

APPENDIX B
NEW YORK STATE CONSTITUTION

Article 6, Sec. 27 Constitution of the State of New York

(McKinney's Consolidated Laws of New York, Book 2).

"Section 27 (Extraordinary terms of the Supreme Court):

The Governor may, when in his opinion the public interest requires, appoint extraordinary terms of the Supreme Court. He shall designate the time and place of holding the term and the justice who shall hold the term. The governor may terminate the assignment of the justice and may name another justice in his place to hold the term."

Article 6, Section 28, Constitution of the State of New York
(McKinney's Consolidated Laws of New York, Book 2).

"Sec. 28. Administrative Supervision of the Courts

"The authority and responsibility for the administrative supervision of the unified court system for the state shall be vested in the administrative board of the judicial conference. The administrative board shall consist of the chief judge of the court of appeals, as chairman, and the presiding justices of the appellate divisions of the four judicial departments. The administrative board, in consultation with the judicial conference, shall establish standards and administrative policies for general application throughout the state. The composition and functions of the judicial conference shall be as now or hereafter provided by law. In accordance with the standards and administrative policies established by the administrative board, the appellate divisions shall supervise the administration and operation of the courts in their respective departments."

STATUTES OF STATE OF NEW YORK

Section 86 Judiciary Law. (McKinney's Consolidated Laws of New York, Book 29)

Section 86. Designation by appellate division of special and trial terms of the supreme court.

"The justices of the appellate division in each department shall have power to fix the times and places for holding special and trial terms of the supreme court held therein, and to assign the justices in the departments to hold such terms; or make rules therefor; and may from time to time make additional appointments and designations, or change or alter those already made.

***"

Section 87 Judiciary Law. (McKinney's Consolidated Laws of New York, Book 29).

Section 87. Rules appointing terms must be signed and filed.

The rules made by the justices of an appellate division for fixing the times and places for holding special and trial terms, must be signed by the justices making them, and immediately filed in the office of the secretary of state; and a duplicate thereof must also be filed in the office of the clerk of such appellate division.

Section 88 Judiciary Law. (McKinney's Consolidated Laws of New York, Book 29).

Section 88. Designation by presiding justice of appellate division of justice to hold term of supreme court.

If it appear to the satisfaction of the presiding justice of the appellate division in any department that a special or trial term of the supreme court duly appointed therein is in danger of failing, he may designate a justice who resides in that department to hold such term in the absence of the justice assigned thereto. If in the opinion

of such presiding justice it is not practicable to make a designation from his department, he shall inform the governor who may thereupon designate for such term a justice from any department. L.1909, c. 35; formerly §86, renumbered 88, L.1945, c. 649, §42, eff. April 9, 1945.

Section 149 of the Judiciary Law, subd. 1. (McKinney's Consolidated Laws of New York, Book 29).

Section 149. Governor may appoint extraordinary terms and name justices to hold them.

1. The governor may, when in his opinion the public interest requires, appoint one or more extraordinary special or trial terms of the supreme court. He must designate the time and place of holding the same, and name the justice who shall hold or preside at such term, and he must give notice of the appointment in such manner as, in his judgment, the public interest requires. The governor may terminate the assignment of the justice named by him to hold a term appointed pursuant to this section, and may name another justice in his place to hold the same term. ***"

Section 149 Judiciary Law, subd. 2. (McKinney's Consolidated Laws of New York, Book 29)

"2. A motion involving a matter pending before such extraordinary special or trial term shall be made returnable at such term, except that, in the exercise of discretion, a justice of the appellate division of the supreme court in the department in which such extraordinary special or trial term is being held may grant permission for such motion to be heard at a term of such appellate division."

Section 212 Judiciary Law (McKinney's Consolidated Laws of New York Book 29).

"Sec. 212. Functions of the administrative board.

The administrative board shall have the authority and responsibility for the administrative supervision of the unified court system. In discharge of that authority and responsibility the administrative board, in consultation with the judiciary conference, may adopt, amend, rescind and make effective standards and policies for general application throughout the state, including but not limited to standards and policies relating to the following administrative powers and duties:

1. Personnel practices, title structure, job definition, classification, qualifications, appointments, promotions and reinstatements, performance rating, sick leave, vacations, time allowances and removal of non-judicial personnel of the unified court system. ***"

Section 63 Executive Law. (McKinney's Consolidated Laws of New York Book 18).

Section 63. General Duties. The Attorney General shall:

1. Prosecute and defend all actions and proceedings in which the state is interested, and have charge and control of all the legal business of the departments and bureaus of the state, or of any office thereof which requires the services of attorneys or counsel, in order to protect the interests of the state ***.

2. Whenever required by the governor, attend in person, or by one of his deputies, any term of the Supreme Court or appear before the Grand jury thereof for the purpose of managing and conducting in such court or before such jury criminal actions or proceedings as shall be specified in such requirement ***."

Civil Practice Law and Rules Sec 5601 (b) (McKinney's Consolidated Laws of New York, Book 7B).

Sec. 5601. Appeals to the court of appeals as of right.

(b) *Constitutional grounds.* An appeal may be taken to the court of appeals as of right:

1. from an order of the appellate division which finally determines an action where there is directly involved the construction of the constitution of the state or of the United States; and

2. from a judgment of a court of record of original instance which finally determines an action where the only question involved on the appeal is the validity of a statutory provision of the state or of the United States under the constitution of the state or of the United States.

Civil Practice Law and Rules Sec. 5602 (a) (McKinney's Consolidated Laws of New York, Book 7B).

Section 5602. Appeals to the court of appeals by permission

(a) *Permission of appellate division or court of appeals.* An appeal may be taken to the court of appeals by permission of the appellate division granted before application to the court of appeals, or by permission of the court of appeals upon refusal by the appellate division or upon direct application:

1. in an action originating in the supreme court, a county court, a surrogate's court, the court of claims or an administrative agency,

(i) from an order of the appellate division which finally determines the action and which is not appealable as of right, or ***"

Executive Order No. 58 (9 Official New York Codes Rules and Regulations, Sec. 1.58)

Executive Order No. 58: [Placing requirement on Attorney General in relation to certain crimes committed by public servants in the County of Kings]

TO: THE HONORABLE LOUIS J. LEFKOWITZ
ATTORNEY GENERAL OF THE STATE OF NEW YORK
STATE CAPITOL
ALBANY, NEW YORK

"I. Pursuant to article IV section three of the constitution of the State of New York, the provisions of subdivision two of section 63 of the Executive Law and the statutes and law in such case made and provided, and in view of the recommendation of the Commission to Investigate Allegations of Police Corruption in the City of New York, I hereby require that you, the Attorney General of this State, attend in person, or by one or more of your assistants or deputies, an Extraordinary Special and Trial Term of the Supreme Court to be appointed by me to be held in and for the county of Kings at the County Court House and any other term or terms of the Supreme Court in and for the County of Kings, and that you, in person or by said assistants or deputies, appear before the grand jury drawn for said extraordinary term of said court, and before any grand jury or grand juries which shall be drawn or which shall have heretofore been drawn for any other term or terms of said court, for the purpose of managing and conducting in said court and before said grand jury and said other grand juries any and all proceedings, examinations and inquiries and any and all criminal actions and proceedings which may be had or taken by or before said grand jury and grand juries concerning or relating to:

(a) any and all corrupt acts and omissions by a public servant or former public servant occurring heretofore or hereafter in the County of Kings in violation of any

provision of State or local law and arising out of, relating to or in any way connected with the enforcement of law or administration of criminal justice in the City of New York;

(b) any and all acts and omissions and alleged acts and omissions by any person occurring heretofore or hereafter in the County of Kings in violation of any provision of State or local law and arising out of, relating to or in any way connected with corrupt acts or omissions by a public servant or former public servant arising out of, relating to or in any way connected with the enforcement of law or administration of criminal justice in the City of New York;

(c) any and all acts and omissions and alleged acts and omissions occurring heretofore or hereafter to obstruct, hinder or interfere with any inquiry, prosecution, trial or judgment pursuant to or connected with this requirement;

and that you conduct, manage, prosecute and handle such other proper actions and proceedings relating thereto as may come before said court and that you conduct, manage, prosecute and handle all trials at said extraordinary term of court or at any term of said court at which any and all indictments which may be found and which may hereafter be tried, pursuant to or in connection with this requirement, and in the event of any appeal or appeals or other proceedings connected therewith, to manage, prosecute, conduct and handle the same; and that in person or by your assistants or deputies you, as of the date hereof, supersede and in the place and stead of the District Attorney of the County of Kings exercise all the powers and perform all the duties conferred upon you by the statutes and law in such case made and provided and this requirement made hereunder; and that in such proceedings and actions the District Attorney of the County of Kings shall exercise only such powers and perform such duties as are required of him by you or your assistants or deputies so attending.

II. Pursuant to subdivision 8 of section 63 of the Executive Law, I also find it to be in the public interest to require that you inquire into matters concerning the public peace, public safety and public justice with respect to the subjects which are within the scope of this requirement, and I so direct you to do so in person or by your assistant or deputies and to have the powers and duties specified in such subdivision 8 for the purposes of this requirement ***"

Executive Order No. 64 (9 N.Y.C.R.R. 1.64).

Executive Order No. 64: [Amending Executive Order No. 57 by appointing an indefinite extraordinary special and trial term of the Supreme Court to be held in the County of Kings.]

TO: THE HONORABLE LOUIS J. LEFKOWITZ
ATTORNEY GENERAL OF THE STATE OF NEW YORK
STATE CAPITOL
ALBANY, NEW YORK

WHEREAS, in my opinion, the public interest requires it:

I. NOW, THEREFORE, in accordance with Article VI Section 27 of the Constitution, statute and law in such case made and provided, I do hereby appoint an Extraordinary Special and Trial Term of the Supreme Court to be held at the Kings County Supreme Court Building, 360 Adams Street, in the County of Kings on the 16th day of October nineteen hundred seventy-two, at ten o'clock in the forenoon of that day and to continue for so long as it may be necessary for the purpose of any criminal, civil or other judicial action or proceeding which may be attended by the Attorney General or by one or more of his deputies or assistants and which may be held, conducted or given thereat concerning or relating to the subjects within the scope of my executive order and requirement to the Attorney General, numbered fifty-eight and dated September nineteen, nineteen hundred seventy-two, and all amendments thereto heretofore or

hereafter promulgated, and for the purpose of conducting and handling such other proper acts, procedures, and matters relating thereto as may come before the court.

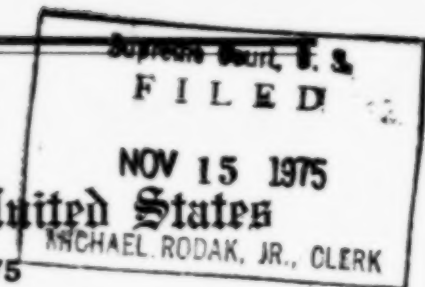
II. I do hereby designate the Honorable John M. Murtagh, a Justice of the Supreme Court of the State of New York, First Judicial District, to hold the said Extraordinary Special and Trial Term as hereinabove appointed and described and among other things to cause to be drawn according to law a grand jury or grant juries to serve the said Extraordinary Special and Trial Term of the Supreme Court.

III. I do further direct that copies of the notice of the appointment and the designation hereinabove made and provided for shall be released and distributed to the general press.

Signed: Nelson A. Rockefeller

Dated: October 13, 1972

IN THE
Supreme Court of the United States
October Term, 1975



No. 75-648

FRED G. MORITT,

Appellant,

against

EXTRAORDINARY SPECIAL AND TRIAL TERM OF THE SUPREME COURT, COUNTY OF KINGS, HON. JOHN M. MURTAGH, as Presiding Justice of the Extraordinary Special and Trial Term, HON. MAURICE H. NADJARI, as Special Deputy Attorney General, LOUIS J. LEFKOWITZ, Attorney General of the State of New York,

Appellees.

On Appeal from the Supreme Court of the
State of New York, Appellate Division,
Second Judicial Department

MOTION TO DISMISS OR AFFIRM

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IN THE
Supreme Court of the United States
October Term, 1975

No. 75-648

FRED G. MORITT,

Appellant,

against

EXTRAORDINARY SPECIAL AND TRIAL TERM OF THE SUPREME COURT, COUNTY OF KINGS, HON. JOHN M. MURTAGH, as Presiding Justice of the Extraordinary Special and Trial Term, HON. MAURICE H. NADJARI, as Special Deputy Attorney General, LOUIS J. LEFKOWITZ, Attorney General of the State of New York,

Appellees.

**On Appeal from the Supreme Court of the
State of New York, Appellate Division,
Second Judicial Department**

MOTION TO DISMISS OR AFFIRM

Preliminary Statement

Appellees move the Court to dismiss the appeal herein on the ground that it does not present a substantial federal question, or in the alternative, to affirm the judgment of the New York Supreme Court, Appellate Division, Second

Department, on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

Decisions Below

The judgment of the New York Supreme Court, Appellate Division, Second Department, is reprinted at page 30 of the Jurisdictional Statement and is reported at 46 A.D. 2d 1012. The order of the New York Court of Appeals dismissing the appeal is reprinted at page 31 of the Jurisdictional Statement and the accompanying memorandum opinion is reported at 36 N.Y. 2d 911. The orders of the Court of Appeals denying reargument and leave to appeal are reprinted at pages 32 and 33 of the Jurisdictional Statement and are as yet unreported.

Jurisdiction

The judgment of the New York Supreme Court, Appellate Division, Second Department, was entered December 27, 1974. The New York Court of Appeals dismissed the appeal on June 4, 1975, and denied leave to appeal on September 10, 1975. Notice of appeal to this Court was filed in the Appellate Division on September 29, 1975. Appellant invokes the appellate jurisdiction of this Court pursuant to 28 U.S.C. §1257 (2).

Statutes Involved

The pertinent state constitutional and statutory provisions are set forth in the Jurisdictional Statement at pages 34-42.

Statement of the Case

On September 19, 1972, Governor Nelson A. Rockefeller of New York, acting pursuant to section 63 of the New York Executive Law, designated State Attorney General Louis J. Lefkowitz to supersede the five district attorneys in New York City and prosecute all acts of corruption relating to the enforcement of law and administration of criminal justice in the city. Exec. Order Nos. 55, 56, 57, 58, 59, 9 NYCRR 1.55-59. Appellee Maurice H. Nadjari was appointed Deputy Attorney General and Special State Prosecutor to supervise these matters. On October 13, 1972, acting pursuant to article VI, section 27, of the New York State Constitution, Governor Rockefeller designated an Extraordinary Special and Trial Term of the New York Supreme Court in each county in the city for trial of the Special Prosecutor's cases and appointed Justice JOHN M. MURTAGH to preside at each term. Exec. Order Nos. 61, 62, 63, 64, 65, 9 NYCRR 1.61-65.

By an indictment filed April 17, 1974, the Extraordinary Special Grand Jury for the County of Kings charged Fred G. Moritt, the appellant, with the crimes of conspiracy in the third degree (N.Y. Penal Law §105.05 [McKinney 1967]), grand larceny in the second degree (N.Y. Penal Law §155.35 [McKinney 1967]), perjury in the first degree (two counts) (N.Y. Penal Law §210.15 [McKinney 1967]), and tampering with a witness (N.Y. Penal Law §215.10 [McKinney 1967]). Indictment No. S.P.O. K-13/1974.* Specifically, the indictment alleges that from June, 1972,

* For the convenience of the Court, the indictment is reprinted as an addendum to this motion.

to January, 1974, Moritt, a Judge of the Civil Court of the City of New York, conspired with Theodore Mann and others to cause Mann "to be placed on the New York City payroll at a salary of \$18,500 a year under the pretense that Mann would perform services as a Law Secretary in the Civil Court of the City of New York." According to this arrangement, Mann received this salary and then made these funds available to Moritt for production of a play; in addition, Moritt hired a law school graduate at one hundred dollars per week to occupy a desk in his chambers and "create the impression that a Judge's Law Secretary was in attendance and performing work in the Civil Court" (count 1). Consequently, from about September 18, 1972, to about January 24, 1974, Moritt stole a total of \$26,050 from the City of New York (count 2). The indictment further alleges that Moritt testified falsely before the Grand Jury on these and other matters (counts 3, 4), and intentionally made a false statement to a Grand Jury witness to affect the witness's testimony (count 5).

Subsequent to the filing of the indictment, Moritt moved in the New York Supreme Court, Appellate Division, Second Department, by permission granted pursuant to subdivision 2 of section 149 of the New York Judiciary Law, for an order dismissing the indictment, *inter alia*, on the grounds that the Special State Prosecutor did not have jurisdiction over the case under the Governor's Executive Order Number 58, 9 NYCRR 1.58 (order of superseder for Kings County), and that the evidence before the Grand Jury was insufficient. After examining the Grand Jury minutes, the Appellate Division, in a memorandum opinion dated November 12, 1974, denied the motion. *Matter of*

Moritt v. Nadjari, 46 A.D. 2d 784 (2d Dept. 1974).^{*} Moritt separately moved for reargument and reconsideration of his motion and amendment of the Appellate Division's order; the Appellate Division denied these applications. A motion similar to that made in the Appellate Division is now pending in the trial court.^{**}

Shortly after the denial of his initial motion to dismiss, Moritt petitioned the Appellate Division, Second Department, for an order pursuant to article 78 of the New York Civil Practice Law and Rules prohibiting his prosecution. In his petition he alleged that article VI, section 27, of the New York State Constitution, section 149, subdivisions 1 and 2, of the New York Judiciary Law, section 63 of the Executive Law, and Executive Order Number 58, 9 NYCRR 1.58, are unconstitutional, that the indictment is jurisdictionally invalid because judges and law secretaries are subject to the supervision of the Administrative Board of the New York Judicial Conference and not criminal prosecution for the crimes alleged, and that Executive Order Number 58 does not vest the Special State Prosecutor with jurisdiction over the case. In an affidavit and accompany-

^{*} As the application was a motion to dismiss the indictment and not a petition for prohibition pursuant to article 78 of the New York Civil Practice Law and Rules, the Appellate Division noted that the moving papers should have been entitled, "People of the State of New York v. Fred G. Moritt."

^{**} Alleging prosecutorial misconduct, Moritt has also instituted a civil rights action against the Special State Prosecutor and others in the United States District Court for the Eastern District of New York. By an order entered August 27, 1975, Chief Judge MISHLER, upon the Special Prosecutor's motion, dismissed all but one of the counts in Moritt's complaint. *Moritt v. Nadjari*, — F. Supp. — (E.D.N.Y.1975). By permission granted pursuant to 28 U.S.C. §1292(b), the Special Prosecutor is presently appealing the District Court's order as to the undismitted count to the United States Court of Appeals for the Second Circuit.

ing memorandum of law, Special Assistant Attorney General Kenneth R. Wolfe opposed the application, both on the merits and on the ground that article 78 relief was not available to appellant. By an order entered December 27, 1974, the Appellate Division, without opinion, denied the petition and dismissed the proceeding on the merits. *Matter of Moritt v. Extraordinary Special and Trial Term, Supreme Court, Kings County*, 46 A.D. 2d 1012 (2d Dept. 1974).

Moritt sought to appeal by right from this judgment to the New York Court of Appeals on constitutional grounds pursuant to New York Civil Practice Law and Rules 5601. On June 4, 1975, the Court of Appeals granted the Special State Prosecutor's motion to dismiss the appeal, holding "that no substantial constitutional question is directly involved (CPLR 5601, par [b], par 1)." The court further noted, "We do not reach the obvious question as to whether prohibition lies under CPLR article 78 (*Matter of Nigrone v Murtagh*, 36 NY 2d 421; *Matter of State of New York v King*, 36 NY 2d 59)." 36 N.Y. 2d 911. On September 10, 1975, the Court of Appeals denied Moritt's motions for re-argument of the dismissal of the appeal and for leave to appeal. — N.Y.2d —.

On appeal to this Court from the Appellate Division, appellant raises the same claims, with the exception of his challenge to the jurisdiction of the Special State Prosecutor, which is a question of New York State law.

ARGUMENT

The questions raised are so unsubstantial as not to warrant further argument.

Appellant's first attack is directed at article VI, section 27, of the New York State Constitution, and its implementing statute, section 149, subdivision 1, of the Judiciary Law, both of which provide that the Governor may, when "the public interest requires," appoint one or more extraordinary special and trial terms of the Supreme Court and may name "the justice who shall hold the term"; further, the Governor "may terminate the assignment of the justice and may name another justice in his place to hold the term." By this procedure, the Governor, as he did at the same time in the other four counties of New York City, established the Extraordinary Special and Trial Term of the Supreme Court, Kings County, for the trial of cases brought by the Special State Prosecutor, and named Mr. Justice JOHN M. MURTAGH to preside at the term. Exec. Order No. 64, 9 NYCRR 1.64. Moritt claims that this procedure allows the Governor to appoint and remove a judge at will and thus violates the separation of powers doctrine of the United States Constitution and the independence of the judiciary. He is wrong.

To begin with, the federal courts in *United States ex rel. Monty v. McQuillan*, 385 F. Supp. 1308 (E.D.N.Y. 1974), *aff'd*, 516 F. 2d 897 (2d Cir. 1975), have rejected a similar challenge to the procedure. Specifically, Judge Judd noted that the procedure does not violate due process standards, for a defendant has no right to a judge of his own choosing

or even to a certain method of selecting a judge, as long as the judge is fair and impartial. 385 F.Supp. at 1310; see *United States v. Keane*, 375 F.Supp. 1201, 1204 (N.D. Ill. 1974). The court further observed in a statement most appropriate to the case at bar:

"No substantial charge of actual bias is made against Mr. Justice Murtagh. The general rule is that questions whether it would be improper to sit in a particular case are 'a matter confided to the conscience of the particular judge.' *Weiss v. Hunna*, 312 F. 2d 711, 714 (2d Cir. 1963), cert. denied, 374 U.S. 853, 83 S.Ct. 1920, 10 L.Ed. 2d 1073, rehearing denied, 375 U.S. 874, 84 S.Ct. 37, 11 L.Ed.2d 104 quoting *MacNeil Bros. Co. v. Cohen*, 264 F. 2d 186, 189 (1st Cir. 1959). Bias can be charged in any event only on a showing that it stems from an extrajudicial source and results 'in an opinion on the merits on some basis other than what the judge learned from his participation in the case.' *United States v. Grinnell Corp.*, 384 U.S. 563, 583, 86 S.Ct. 1698, 1710, 16 L.Ed. 2d 778 (1966)." *United States ex rel. Monty v. McQuillan*, *supra*, 385 F.Supp. at 1311.

The *Monty* case thus vitiates appellant's claim that the establishment of an extraordinary term infringes upon the independence of the judiciary in violation of due process. Appellant fails to rebut the logic of that decision. Moreover, he has in no way shown or even hinted that the Governor who appointed this Extraordinary Term or the many governors who in the past have established similar terms have done so with any purpose other than that prescribed by the statute, *i.e.*, when the public interest requires such action. Indeed, for the Governor to "appoint a judge to do his bidding," as appellant fears, would be a "violation

of [the] law" under attack. *People v. Davis*, 67 Misc. 2d 14, 16 (Sup. Ct., Extraordinary Special and Trial Term, Ontario Co. 1971).

The additional power of the Governor to terminate the assignment and name another justice to hold the term is one of necessity, occasioned by the possibility that a presently assigned justice may become unable or unwilling to continue his position. The Governor has no judicial function or influence in the proceedings. Aside from the power to assign and remove the justice, the Governor "has no power to do more," and he "has not attempted to do more." *People ex rel. Saranac Land & Timber Co. v. Supreme Court*, 220 N.Y. 487, 492 (1917). Indeed, he has not yet even removed or replaced the justice originally assigned to this Extraordinary Term.

In short, an extraordinary term is "to be conducted in accordance with the rules of law governing all the other terms of court with the exception of the designation of the judge." *Matter of Reynolds v. Cropsey*, 241 N.Y. 389, 395 (1925). The procedure in no way creates a tribunal with a built-in personal or pecuniary interest in the outcome of a trial. *Cf. Gibson v. Berryhill*, 411 U.S. 564 (1973); *In re Murchison*, 349 U.S. 133 (1955); *Tumey v. State of Ohio*, 273 U.S. 510 (1927). Indeed, if the trial judge is unbiased, or if no prejudice is shown, appellant would have no reason to complain. *United States ex rel. Monty v. McQuillan*, *supra*, 385 F. Supp. at 1311. And if the judge is biased against appellant, the latter has an adequate remedy in the state trial court for seeking the judge's disqualification. N.Y. Judiciary Law §14 (McKinney 1968); 22 NYCRR 33.3(c) (N.Y. Judicial Conference).

As to appellant's additional argument that an extraordinary term violates the federal separation of powers doctrine, the United States Constitution contains no requirement that the structure of state governments conform exactly to the structure of the national government. The federal separation of powers doctrine does not apply to the states:

"Whether the legislative, executive and judicial powers of a state shall be kept altogether distinct and separate, or whether persons or collections of persons belonging to one department may, in some respect to some matters, exert powers which, strictly speaking, pertain to another department of government, is *for the determination of the state*. And its determination one way or the other cannot be an element in the inquiry, whether the due process of law prescribed by the 14th Amendment has been respected by the state or its representatives when dealing with matters involving life or liberty." *Dreyer v. Illinois*, 187 U.S. 71, 84 (1902) (emphasis supplied).

Cf. United States v. Brown, 381 U.S. 437, 442-43 (1965). In truth, all that the Constitution requires of each state is a "Republican Form of Government" (U.S. CONST. art. IV, §4), the existence of which here is demonstrated by the fact that the People of the State of New York themselves voted to adopt the very state constitutional provision under attack. *See* N.Y. CONST. art. XIX, §1 (McKinney 1969).

Another challenged statute, section 149, subdivision 2, of the New York Judiciary Law, provides that the Appellate Division, in its discretion, may hear a motion addressed to an extraordinary special and trial term. This procedure, appellant claims, denies him equal protection of the

laws since, allegedly unlike other defendants in the ordinary criminal terms of the New York Supreme Court, he is relegated to addressing all pretrial motions to the same judge in an extraordinary term, subject only to the discretion of the Appellate Division to hear such motions. But ordinary criminal defendants, like defendants in an extraordinary term, have no right to a judge of their own choice, *United States ex rel. Monty v. McQuillan*, *supra*, and similarly must make all pretrial motions to a single judge, unless "defendant shows that it would be prejudicial to the defense were a single judge to consider all the pre-trial motions." N.Y. Criminal Procedure Law §255.20 (2) (McKinney 1971). Surely, however, the existence of such prejudice to an extraordinary term defendant would likewise be a factor in the Appellate Division's decision whether to hear the motion. And, of course, in such case the defendant would have the benefit of five appellate judges rather than one trial judge hearing his motion.

Moritt further claims that once in the Appellate Division, the rules of that court, at least in the Second Department (22 NYCRR 670.3 [b]), deny him oral argument of his motion, as opposed to ordinary criminal defendants. His argument is misleading. State law does not mandate oral argument for any pretrial criminal motions. *See* N.Y. Criminal Procedure Law §255.20 (McKinney 1971). Indeed, Rule 752.11 of the New York Supreme Court, Kings County (22 NYCRR 752.11), relied on by Moritt to show that oral argument is allowed in criminal cases, concerns a civil part (Special Term Part I), not a criminal part, of that court. In any event, the Appellate Division has on occasion abrogated its own rule and heard oral argument

on pretrial motions for defendants in the present Extraordinary Term. *E.g., Matter of Nigrone v. Murtagh*, 46 A.D. 2d 343 (2d Dept. 1974), *aff'd*, 36 N.Y. 2d 421 (1975); *People v. Steinman*, 44 A.D. 2d 839 (2d Dept. 1974). In short, the decision whether to hear oral argument on a motion is discretionary with all courts.

Also frivolous is Moritt's apparent claim that the very existence of the Appellate Division's discretion to hear pretrial motions violates equal protection. Indeed, Moritt has little reason to complain since the Appellate Division in his case exercised its discretion in his favor and agreed to hear his pretrial motion. *Matter of Moritt v. Nadjari*, 46 A.D. 2d 784 (2d Dept. 1974). Moreover, the use of sound judicial discretion is not uncommon to state or federal courts in setting bail, imposing sentence or granting leave to appeal, or to this Court in granting certiorari. Finally, there is no showing that the Appellate Division has practiced invidious discrimination or unreasonable distinctions in deciding whether to entertain pretrial motions. *Cf. Williams v. Oklahoma City*, 395 U.S. 458 (1969); *Baxstrom v. Herold*, 383 U.S. 107 (1966); *Griffin v. State of Illinois*, 351 U.S. 12 (1956).

The next challenged statute, section 63, subdivision 2, of the New York Executive Law, provides that the Attorney General or one of his deputies (in this case, the Special State Prosecutor, pursuant to the Governor's Executive Order Number 58, 9 NYCRR 1.58), shall, upon request of the Governor, supersede a local district attorney, and prosecute a certain case or class of cases. Appellant's argument that the Special Prosecutor abused his authority by engag-

ing in various forms of misconduct is not a challenge to the constitutionality of a statute, but only to the prosecutor's conduct. *See Phillips v. United States*, 312 U.S. 246, 252 (1941).^{*} Since his claim does not challenge a state statute, it is not cognizable by appeal in this Court. *Zucht v. King*, 260 U.S. 174, 177 (1922). The additional argument that the Governor's designation of the Attorney General was improperly executed is again an attack on an act, not a statute. If anything, Moritt questions the correctness of the Governor's action under the very statute challenged, Executive Law section 63, a matter of state law not reviewable in this Court. *Herb v. Pitcairn*, 324 U.S. 117, 125-26 (1945). At best, Moritt's claims amount to saying that a statute is unconstitutional because the statute itself has been violated, an untenable proposition.

Moritt's final claim is that the conduct of judges and their law secretaries is governed by state court administrative rules and that his prosecution for criminal misconduct constitutes an *ex post facto* application of the law. His petition in the Appellate Division regarding this issue challenged the prosecution only on jurisdictional grounds, as governed by state law, and not on federal *ex post facto* grounds. The federal claim has thus not been properly preserved for review. *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969). In any event, the claim is meritless. Never has it been suggested by New York law that a judge who lies to a grand jury or steals money from the City of New York by whatever fraudulent means he may devise is im-

^{*} The question of alleged prosecutorial misconduct was not presented to the Appellate Division in the instant prohibition proceeding. Indeed, under state law, appellant would have been unable to raise the issue on a petition for a writ of prohibition. *See note, p. 14, infra*. The question of prosecutorial misconduct remains to be resolved in the trial court.

mune from criminal prosecution solely because he may also be subject to disciplinary action by administrative authorities. Cf. *Bowie v. City of Columbia*, 378 U.S. 347 (1964). Suffice it to say that the specific Penal Law provisions which form the basis of the indictment and which have been in effect since 1967 apply to everyone who violates them in New York State, including members of the judiciary.

In sum, the questions raised wholly lack merit and certainly a substantial federal question. *Zucht v. King*, 260 U.S. 174, 176 (1922); *Sugarman v. United States*, 249 U.S. 182, 184 (1919); *Equitable Life Assurance Society v. Brown*, 187 U.S. 308, 311 (1902). If the Appellate Division erred at all, it probably did so only in procedurally entertaining Moritt's petition for prohibition in the first place.* Having done so, however, it correctly decided the case on the merits.

* New York law is clear that prohibition lies only to restrain a court's excess of power, i.e., when "a court acts without jurisdiction, or acts or threatens to act in excess of its powers, and it affirmatively appears that this will be done in violation of a person's, even a party's rights, but especially constitutional rights." *La Rocca v. Lane*, — N.Y. 2d — (Oct. 24, 1975); see *Matter of Nigrone v. Murtagh*, 36 N.Y. 2d 421 (1975); *Matter of State of New York v. King*, 36 N.Y. 2d 59 (1974); *Matter of Lee v. County Court, Erie County*, 18 N.Y. 2d 330 (1966). The jurisdiction of the trial court was not in the instant case specifically in issue, as an extraordinary term of the New York Supreme Court has the "same jurisdiction that belongs to any other term," *Saranac Land & Timber Co. v. Roberts*, 227 N.Y. 188, 191 (1919), and the Supreme Court has jurisdiction over the trial of all indictments. N.Y. CONST. art. VI, §7 (McKinney 1969). All that appellant was challenging was the manner in which the judge was designated and the accompanying procedure. Thus, whether under state law the Appellate Division properly entertained the proceeding on the merits may be seriously questioned. Indeed, in dismissing Moritt's appeal from the Appellate Division, the Court of Appeals noted that at the outset the case involved "the obvious question as to whether prohibition lies under CPLR article 78." *Matter of Moritt v. Extraordinary Special and Trial Term, Supreme Court, Kings County*, 36 N.Y. 2d 911 (1975).

Conclusion

The appeal should be dismissed, or the judgment appealed from should be affirmed.

Respectfully submitted,

MAURICE H. NADJARI
Deputy Attorney General
Special State Prosecutor
Attorney for Appellees

BENNETT L. GERSHMAN
ALLEN G. SWAN
Special Assistant Attorneys General
Of Counsel

November, 1975

ADDENDUM

Indictment Number S.P.O. K-13/1974

People v. Moritt

Indictment

SUPREME COURT OF THE STATE OF NEW YORK

EXTRAORDINARY SPECIAL AND TRIAL TERM

COUNTY OF KINGS

Indictment No. S.P.O. K-13/1974

THE PEOPLE OF THE STATE OF NEW YORK

against

FRED G. MORITT,

Defendant.

THE EXTRAORDINARY SPECIAL GRAND JURY OF THE COUNTY OF KINGS, by this indictment, accuses the defendant of the crime of CONSPIRACY IN THE THIRD DEGREE, in violation of Section 105.05 of the Penal Law committed in the County of Kings, as follows:

The defendant from in or about June 1972 to in or about January 1974, with intent to engage in conduct constituting a felony, agreed with Theodore Mann and others to engage in conduct and cause the performance of conduct constituting the crime of Grand Larceny in the Second Degree.

[Add. 1]

Add. 2

Addendum—Indictment

During the period of the conspiracy, the defendant was a Judge of the Civil Court of the City of New York and Theodore Mann was an attorney duly licensed to practice law in the State of New York.

During the course of the conspiracy, Participating Investors, Ltd. was a domestic corporation formed for the purpose of producing a play. In that period the defendant was a director of the corporation and his wife was its President and principal stockholder. Also during the conspiracy Theodore Mann was a director and Secretary of the corporation, as well as being a major stockholder. In the period of the conspiracy, the defendant directed activities of Participating Investors, Ltd. from his Civil Court Chambers at 120 Schermerhorn Street, Brooklyn, New York.

It was the corrupt plan of the defendant that he and others would steal monies from the City of New York by causing Theodore Mann to be placed on the New York City payroll at a salary of \$18,500 a year under the pretense that Mann would perform services as a Law Secretary in the Civil Court of the City of New York.

It was the corrupt plan of the defendant that Mann would pretend to be the defendant's Law Secretary in order to obtain the bi-weekly payroll checks ordinarily paid by the City of New York to a Law Secretary in the Civil Court.

According to the plan, the payroll checks would be deposited in Mann's checking account, but Mann would make those funds available to the defendant upon his request. Also, pursuant to this plan, Mann agreed to pay the monies

Add. 3

Addendum—Indictment

unlawfully obtained from the City of New York to certain individuals designated by the defendant.

It was part of the corrupt arrangement that a portion of the funds stolen from the City of New York would be diverted to Participating Investors Ltd., and utilized to hire and employ individuals to perform work in the defendant's chambers for that corporation.

It was also part of the corrupt arrangement that the defendant would use some of the monies stolen from the City of New York to hire a young law school graduate who would occupy a desk in the defendant's chambers and run errands and perform other chores for the defendant—thereby creating the impression that a judge's Law Secretary was in attendance and performing work in the Civil Court. According to the plan, the young law school graduate would receive \$100 a week from Theodore Mann for the work he would perform for Participating Investors Ltd.

OVERT ACTS

In furtherance of the conspiracy and to effect the objects thereof, the conspirators committed and caused to be committed the following overt acts:

1. On September 11, 1972, the defendant hired Dennis Unterman, a young law school graduate.
2. On September 11, 1972, the defendant told Unterman that Mann would pay his salary.

Add. 4

Addendum—Indictment

3. On or about September 18, 1972, the defendant appointed Mann his Law Secretary.
4. On or about October 3, 1972, the defendant hired Ruth Volner to work for Participating Investors Ltd.
5. On or about October 3, 1972, the defendant told Ruth Volner that she would be paid by Mann.
6. From on or about October, 1973, to on or about January 24, 1974, Dennis Unterman obtained Theodore Mann's bi-weekly paycheck from officials in the Civil Court of the City of New York.
7. From in or about October, 1973, to on or about January 24, 1974, Dennis Unterman endorsed Theodore Mann's signature on bi-weekly payroll checks.
8. From in or about October, 1973, to on or about January 24, 1974, the defendant supplied Unterman with pre-printed deposit slips for Mann's account.
9. From in or about October, 1973, to on or about January 24, 1974, Dennis Unterman deposited bi-weekly payroll checks to an account maintained by Theodore Mann.
10. From on or about September 11, 1972, to on or about January 24, 1974, Mann issued weekly checks to Unterman.
11. From on or about October 3, 1972, to on or about December 24, 1972, Mann paid Volner \$1,510 for work performed for Participating Investors Ltd.

Add. 5

Addendum—Indictment

12. On or about October 2, 1973, the defendant hired Joyce Rossi to work for Participating Investors Ltd.
13. On or about October 2, 1973, the defendant told Joyce Rossi that Mann would pay her salary.
14. From in or about October, 1973, to on or about January 24, 1974, on a weekly basis, Mann mailed checks from Florida to the defendant, made out to Rossi and Unterman.
15. Between on or about October, 1973, and on or about January 24, 1974, the defendant received those checks.
16. Between on or about October, 1973, and on or about January 24, 1974, the defendant gave those checks to Unterman and Rossi.

SECOND COUNT:

AND THE GRAND JURY AFORESAID, by this indictment, accuses the defendant of the crime of GRAND LARCENY IN THE SECOND DEGREE, in violation of Section 155.35 of the Penal Law committed in the County of Kings, as follows:

The defendant from on or about September 18, 1972, to on or about January 24, 1974, did steal from the City of New York, a sum of money in excess of \$1,500, to wit, \$26,050.

Addendum—Indictment

THIRD COUNT:

AND THE GRAND JURY AFORESAID, by this indictment, accuses the defendant of the crime of PERJURY IN THE FIRST DEGREE in violation of Section 210.15 of the Penal Law, committed in the County of Kings, as follows:

The Grand Jury has been conducting an investigation to determine whether certain political party officers have conspired to accept bribes to improperly influence the appointments of Law Secretaries to Judges and Justices of the Courts having jurisdiction in Kings County. The Grand Jury has also been investigating to determine whether, as part of this conspiracy, Law Secretaries were permitted as a result of these bribes to absent themselves from work and to perform no services for the salaries they received.

Evidence adduced before the Grand Jury disclosed that a number of Law Secretaries assigned to the Courts in Kings County collected salaries from the City of New York for which they performed no service. The evidence reflected that the defendant knew the names of a half-dozen Law Secretaries who did not "show up at all." According to the evidence, it has been the practice in Kings County that "district leaders" influence or control the appointments and promotions of Law Secretaries.

More specifically, the evidence before the Grand Jury revealed that an individual named Theodore Mann appeared as a Law Secretary to the defendant on the Civil Court of the City of New York payroll for a period of sixteen months, at an annual salary of \$18,500. The evidence also revealed that Mann rarely appeared at the Court, per-

Addendum—Indictment

formed little or no work and was a resident of the State of Florida for a period of the time that he was on the Court payroll.

Evidence before the Grand Jury showed further that a young law school graduate appeared regularly at the Civil Court to pick up the payroll check made out to Mann. Proof before the Grand Jury indicated that the law school graduate was ineligible to be appointed a Law Secretary, was not employed by the Court, but that he participated in courtroom proceedings as if he were a court official.

Accordingly, it became material and necessary to question the defendant concerning his knowledge of the "half-dozen Judge's secretaries" who did not work.

On March 14, 1974, the defendant appeared as a witness before the Grand Jury, was duly sworn, and gave testimony concerning the investigation.

Whereupon, the defendant swore falsely when he testified that he had at no time told anyone that he knew the names of a half-dozen Judges' secretaries who never report to work.

Whereas in truth and in fact, the defendant stated that he did know the names of a half-dozen Judges' secretaries who never report to work. In fact, the defendant had stated that to Dennis Unterman on the day before he testified before the Grand Jury.

This false testimony was to a material matter, in that it obstructed and prevented the Grand Jury from determining the true facts relating to the employment and work practices of Law Secretaries.

Addendum—Indictment

FOURTH COUNT:

AND THE GRAND JURY AFORESAID, by this indictment, accused the defendant of the crime of PERJURY IN THE FIRST DEGREE in violation of Section 210.15 of the Penal Law, committed in the County of Kings, as follows:

The Grand Jury has been conducting an investigation to determine whether certain political party officers have conspired to accept bribes to improperly influence the appointments of Law Secretaries to Judges and Justices of the Courts having jurisdiction in Kings County. The Grand Jury has also been investigating to determine whether, as part of this conspiracy, Law Secretaries were permitted as a result of these bribes to absent themselves from work and to perform no services for the salaries they received.

Evidence adduced before the Grand Jury disclosed that a number of Law Secretaries assigned to the Courts in Kings County collected salaries from the City of New York for which they performed no service. The evidence reflected that the defendant knew the names of a half-dozen Law Secretaries who did not "show up at all." According to the evidence, it has been the practice in Kings County that "district leaders" influence or control the appointments and promotions of Law Secretaries.

More specifically, the evidence before the Grand Jury revealed that an individual named Theodore Mann appeared as a Law Secretary to the defendant on the Civil Court of the City of New York payroll for a period of sixteen months, at an annual salary of \$18,500. The evidence

Addendum—Indictment

also revealed that Mann rarely appeared at the Court, performed little or no work and was a resident of the State of Florida for a period of the time that he was on the Court payroll.

After the defendant learned that the young law school graduate had been subpoenaed in relation to this Grand Jury investigation, the defendant—according to the testimony—met with this young man and discussed the missing law clerk situation with him.

Accordingly, it became material and necessary to question the defendant concerning his conversation with the young law school graduate.

On March 14, 1974, the defendant appeared as a witness before the Grand Jury, was duly sworn, and gave testimony concerning this investigation.

Whereupon, the defendant swore falsely when he testified that he did not tell the young law school graduate what to say before the Grand Jury.

Whereas, in truth and in fact, the defendant did tell the young Law Secretary what to say before the Grand Jury.

This false testimony was to a material fact in that it obstructed and prevented the Grand Jury from determining the true facts relating to the employment and work practices of Law Secretaries.

Addendum—Indictment

FIFTH COUNT:

AND THE GRAND JURY AFORESAID, by this indictment, accuses the defendant of the crime of TAMPERING WITH A WITNESS in violation of Section 215.10 of the Penal Law committed in the County of Kings, as follows:

The defendant, on March 13, 1974, knowing that Dennis Unterman was about to be called as a witness in a Grand Jury proceeding, knowingly made a false statement to Dennis Unterman with the intent to affect the testimony of Dennis Unterman.

/s/

Maurice H. Nadjari
Deputy Attorney General

A TRUE BILL

April 17, 1974

/s/

FOREMAN

Supreme Court, U. S.
FILED

NOV 24 1975

HANNAH COOK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-648

IN THE MATTER
OF
FRED G. MORITT,

Appellant,

-against-

EXTRAORDINARY SPECIAL AND TRIAL TERM OF THE
SUPREME COURT, COUNTY OF KINGS, HON. JOHN M.
MURTAGH, as Presiding Justice of the Extraordinary Special
and Trial Term, HON. MAURICE H. NADJARI, as Special
Deputy Attorney General, LOUIS J. LEFKOWITZ, Attorney
General of the State of New York,

Appellees

*On Appeal from the Supreme Court of the State of New York,
Appellate Division, Second Judicial Department*

**BRIEF ON BEHALF OF APPELLANT OPPOSING
MOTION TO DISMISS OR AFFIRM APPEAL.**

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-648

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OF
FRED G. MORITT,

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-against-

EXTRAORDINARY SPECIAL AND TRIAL TERM OF THE
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Deputy Attorney General, LOUIS J. LEFKOWITZ, Attorney
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Appellees.

*On Appeal From The Supreme Court
Of The State of New York, Appellate
Division, Second Judicial Department*

**BRIEF ON BEHALF OF APPELLANT OPPOSING
MOTION TO DISMISS OR AFFIRM APPEAL**

Preliminary Statement

This brief is respectfully submitted in support of appellant's
Jurisdictional Statement heretofore filed, and in opposition to
appellees' motion to dismiss or affirm the within appeal.

Decisions Below

The judgment of the New York Supreme Court of the State of New York, Appellate Division, Second Judicial Department, entered December 27, 1975, is reported in *46 App.Div. 2d 1012*. The order and memorandum decision of the New York Court of Appeals, dismissing the appeal taken as of right on constitutional grounds, entered June 4, 1975, is reported in *36 NY 2d 911*. The order of the New York Court of Appeals denying reargument, and the order denying leave to appeal, both entered September 10, 1975, are as yet unreported.

Jurisdiction

Notice of appeal to this Court was duly filed in the New York Supreme Court, Appellate Division, Second Department, on September 29, 1975.

The jurisdiction of this Court to review this final judgment by direct appeal is conferred by Title 28 United States Code Sec. 1257(2).

Statutes Involved

The state statutes involved, as set forth in the Jurisdictional Statement, are as follows: Section 149, subdivisions 1 and 2, Judiciary Law of the State of New York; Article 6, Section 27 New York State Constitution; Section 63 Executive Law of the State of New York, as applied; Article 6, Sec. 28 New York State Constitution, as applied (App. B, pp. 34-42).

Questions Presented

1. Is a state statute and constitutional provision, authorizing the governor to create and appoint an extraordinary term of the supreme court and to designate the special justice who shall preside therein—and further empowering the governor to terminate the assignment of such justice at will, and at any time, and to designate another justice in his place—facially violative of the independence of the judiciary and the Separation of Powers

guaranteed against encroachment by the 5th and 14th Amendments of the Constitution?

2. Is a state statute which substantially diminishes the substantive procedural rights of all litigants in the appellee Extraordinary Term Court, by requiring that all preliminary motions and pre-trial proceedings be brought exclusively in such court, before a judge specially designated by the Governor, and summarily removable at the will, whim or caprice of the Governor, and which further prescribes that in the alternative, in the exercise of discretion by a justice of the appellate division of the Supreme Court, such pre-trial motions may be entertained by the appellate division, facially violative of the equal protection of the laws guaranteed under the 5th and 14th amendments of the Constitution, as compared to the unrestricted pre-trial procedural rights accorded all other litigants in the regular criminal terms of the Supreme Court?

3. Where a state statute expressly requires that the independently-elected constitutional office of the Attorney General of the State of New York appear in person, or by one of his deputies, before the Extraordinary Term of the Supreme Court to manage and conduct all proceedings therein, may the Governor constitutionally dictate the choice and personally designate a special prosecutor to manage and conduct all proceedings in the appellee Extraordinary Term of the Supreme Court, particularly where the presiding justice thereof was likewise personally designated by and was summarily removable at will by the Governor?

4. Is a state prosecution void as *ex post facto* where it intrudes into the special relationship and personnel practices between a judge and his lawfully appointed personal assistant exclusively within the jurisdiction, domain and supervision of the administrative board of the state's unified court system, as specifically mandated by the state statute and the New York State Constitution, upon which appellant and all other judges within the state's unified court system have traditionally relied?

Statement

The Pre-Trial Proceedings

On September 19th, 1972, the Governor of the State of New York issued Executive Order No. 58 (App. B), (9 Official New York Codes, Rules and Regulations, Sec. 1.58) pursuant to the authorization of Section 149 of the Judiciary Law of the State of New York and Article 6, Section 27 of the New York State Constitution, and Section 63 of the Executive Law of the State of New York, establishing an extraordinary special and trial term of the Supreme Court in and for the County of Kings of the State of New York, requiring the selection of a special grand jury for said term, and directing the appellee Attorney General of the State of New York, in person or by one of his deputies, to investigate and prosecute all corrupt acts committed by public servants arising out of, relating to or in any way connected with the enforcement of law or administration of criminal justice in the City of New York (App. B)

On October 13th, 1972, the Governor issued Executive Order 64 (9 N.Y.C.R.R. 1.64), designating and appointing the appellee Hon. John M. Murtagh, as Justice of the Supreme Court of the State of New York, to preside over the Extraordinary Special and Trial Term for the County of Kings and to cause to be drawn a jury to serve at the said Term (App. B).

Appellant was a Judge of the Civil Court of the City of New York, having served since 1957 as a member of that Court. His law secretary, officially designated as a personal assistant, was one Theodore Mann, a duly qualified attorney at law, who was appointed on September 1, 1972.

On April 17, 1974, appellee Nadjari filed an indictment in the Extraordinary Special and Trial Term of the Supreme Court, County of Kings, charging appellant with the alleged crimes of conspiracy in the third degree, grand larceny in the second degree, perjury in the first degree and tampering with a witness.

In substance, the conspiracy and grand larceny counts, of which Mr. Mann was separately indicted, was that the latter had

"performed little or no work" as law secretary to Judge Moritt from September 18, 1972 to January 24, 1974.*

Under the laws of New York, all personnel practices, including appointments, discharges, leaves of absence, sick leaves, vacation and time allowances, etc., of all non-judicial personnel of New York's unified court system are exclusively controlled and regulated, and are within the sole jurisdiction of the administrative board of the Judicial Conference of the State of New York (Article VI, Sect. 28 of the Constitution of the State of New York; Section 212 Judiciary Law, sub. 1 (App. B)).

The conclusive fact is that no rule, regulation or order had been promulgated by the administrative board which did in any way restrict the total and exclusive supervision exercised by the judges over the personnel practices of their law secretaries or clerks within the unified court system of the State of New York.

Subsequent to the filing of the indictment, on July 3rd, 1974, pursuant to Section 149, subd. 1, Judiciary Law (App. B) appellant was granted the discretionary permission of a Justice of the Appellate Division of the Supreme Court to apply to that Court for pre-trial relief to dismiss the indictment on several constitutional and jurisdictional grounds. Among the relief requested was a motion to dismiss the indictment on the ground of the prosecutorial misconduct of appellee Nadjari in wilfully suppressing vital and material evidence before the grand jury which would have completely exonerated appellant of the un-

*As to the baseless perjury and tampering counts, relating to a statement purportedly made by Judge Moritt to Mr. Mann's law clerk, that "defendant swore falsely when he testified that he had at no time told anyone that he knew the names of a half-dozen Judges' secretaries who never report to work", the obvious fact is that it would have been physically impossible for Judge Moritt to have known of his own knowledge whether other judges' secretaries "never report to work." Moreover, no proper foundation had been laid therefor before the grand jury and Judge Moritt's testimony had been wrongfully elicited for the sole purpose of laying the groundwork for a "perjury" prosecution rather than to discover the truth (*Bronston v. United States*, 409 US 352; *United States v. Lardieri*, 497 F.2d 317).

founded charges contained in the indictment. In addition, appellant moved to dismiss the indictment on the ground that the evidence adduced before the grand jury did not constitute a crime.

On November 12th, 1974, the Appellate Division denied the appellant's original application for pre-trial relief, including the aforesaid motions to dismiss the indictment. No oral argument was permitted by the Court although duly requested by appellant. (*Matter of Moritt v. Nadjari*, 46 App.Div. 2d 784 (NY 1974). In its opinion, the Court stated in part:

"In connection with the substantive attack made on the various counts of the indictment, we have examined the Grand Jury minutes. While the theory underlying the charge of grand larceny is thin and the proof in regard thereto quite tenuous, they are nevertheless sufficient to require a denial of the defendant's motion to dismiss.

We have considered the other contentions raised by the defendant and find them to be without merit."

The said order of the Appellate Division was not directly appealable under New York law.

On November 27th, 1974, appellant moved for re-argument upon the specific ground that the denial on the merits of appellant's petition to dismiss the indictment for gross prosecutorial misconduct, without a full-scale factual hearing, and without opportunity to argue, was violative of his right to due process of law, and to the equal protection of the laws. (*Westervelt v. Gregg*, 12 N.Y.2d 202; *Wong Yong Sung v. McGrath*, 339 U.S. 33; *Burgett v. Texas*, 389 U.S. 109). On December 27th, 1974, the Appellate Division denied reargument.

Subsequently, during the pendency of appellant's case before the Extraordinary Term of the Supreme Court, appellant moved the Appellate Division to amend its original order of November 12th, 1974, so as to provide that the denial on the merits,

without a hearing, of his motion to dismiss the indictment in that Court, be "without prejudice to re-consideration and renewal thereof by the Extraordinary Special and Trial Term of the Supreme Court". On May 14th, 1975, the Appellate Division denied appellant's application to amend.

Again, on January 15, 1975, the Appellate Division denied appellant's motion for renewal and reconsideration of his motions to dismiss the indictment, filed upon the specific documented ground that appellee Nadjari had publicly acknowledged on December 18, 1974 that the employment by a judge of an alleged "no-show" law secretary "did not constitute an indictable crime", and that "we need new legislation for that."

Thereafter, as required by the Criminal Procedure Law of New York, Sec. 255.20, appellant filed a series of omnibus motions in the Extraordinary Term of the Supreme Court as follows: To dismiss the indictment on the ground that Section 149 of the Judiciary Law is inherently void on its face, and Section 63 of the Executive Law, as applied, under the Due Process clause of the Constitution; to dismiss the indictment in the interest of justice for gross prosecutorial misconduct shocking to the conscience violative of due process of law; to dismiss the indictment as unconstitutionally *ex post facto* and selectively discriminatory in nature under the Due Process Clause of the Constitution; to stay all proceedings pending final determination of the constitutional issues raised herein.

The Article 78 Proceeding—The Order Appealed From

Subsequent to the original proceeding instituted in the Appellate Division under Sec. 149 of the Judiciary Law, as aforesaid, on November 25th, 1974, appellant instituted a special proceeding in the Appellate Division, Second Judicial Department, of the Supreme Court of the State of New York, for an order under Article 78 of the Civil Practice Law and Rules, to prohibit the appellees from proceeding with the trial of the indictment, and for dismissal of the indictment under the 5th and 14th Amendments of the Constitution of the United States, and Article 1, Sec. 6 of the New York State Constitution, upon the following grounds:

1. That the statute under and by which the appellee Extraordinary Special and Trial Term of the Supreme Court was convened, to wit, *Sec. 149, subd. 1 of the Judiciary Law of New York*, is unconstitutional and void on its face as inherently violative of the independence of the judiciary and the Separation of Powers guaranteed against encroachment by the Due Process Clause of the federal and state constitutions.

2. That the same statute, *Sec. 149 of the Judiciary Law of New York, subd. 2* thereof, is unconstitutional and void on its face, as inherently violative of appellant's right to procedural due process and to the equal protection of the laws under the Constitution.

3. That the appellee Nadjari, unconstitutionally misapplied the state's penal laws by illegally usurping the exclusive jurisdiction vested in the administrative board of the Judicial Conference of the State of New York over the administrative supervision of the unified court system, as provided in Article 6, Sec. 28 of the New York State Constitution, and Section 212 of the Judiciary Law of the State of New York, rendering the indictment against appellant invalidly retroactive, in violation of the 5th and 14th Amendments and Article I, Sec. 9 of the Constitution of the United States forbidding *ex post facto* enforcement of the criminal laws.*

Under New York Law, an Article 78 proceeding is an appropriate vehicle for contesting state action on jurisdictional or constitutional grounds (*Matter of Hogan v. Court of General Sessions*, 296 NY 1, 8; *People ex rel. SL & T Co. v. Extraordinary Term of Supreme Court*, 220 NY 487; *Matter of Reynolds v. Cropsey*, 241 NY 389; *Kovarsky v. Housing & Development*, 31 NY2d 184, 286 N.E.2d 882; *Dunn & Bradstreet, Inc. v. City of New York*, 276 NY 198, 11 N.E.2d 728;

*The petition further contended therein that the appellee Nadjari usurped jurisdiction in that his authority to act was strictly limited to the criminal justice system in the City of New York, by the requirements contained in the Governor's Executive Order, and that the acts charged against appellant were in no way connected with the criminal justice system or the enforcement of law. The construction of a state statute is not reviewable in this court (*Guaranty Trust Co. v. Blodgett*, 287 U.S. 509).

Socha v. Smith, 24 NY 2d 400; *Civil Practice Law and Rules, Article 78* (McKinney's Consolidated Laws of New York, Book 7B).

The Article 78 proceeding aforesaid was instituted in the Appellate Division as an original proceeding by mandate of New York's Civil Practice Law and Rules, Section 506(b)(1), which requires that an Article 78 proceeding against a respondent Justice of the Supreme Court must be initially instituted in the Appellate Division, rather than in the State Supreme Court.

Again, no oral argument was had or permitted on appellant's Article 78 petition.

On December 24, 1974, the Appellate Division dismissed the petition "on the merits", without opinion, (App. A), resulting in the Judgment appealed from herein.

POINT I.

SECTION 149 JUDICIARY LAW, SUBD. 1 AND ART. 6, SEC. 27 OF THE NEW YORK STATE CONSTITUTION, ARE FACIALLY UNCONSTITUTIONAL AS VIOLATIVE OF THE INDEPENDENCE OF THE JUDICIARY AND THE SEPARATION OF POWERS GUARANTEED AGAINST ENCROACHMENT BY THE DUE PROCESS CLAUSE OF THE CONSTITUTION OF THE UNITED STATES AND ARTICLE 1, SEC. 6 NEW YORK STATE CONSTITUTION.

Section 149 Judiciary Law, subd. 1, provides:

Sec. 149. Governor may appoint extraordinary terms and name justices to hold them.

"1. The governor may, when in his opinion the public interest requires, appoint one or more extraordinary special or trial terms of the supreme court. He must designate the time and place of holding the same, the name the justice who shall hold or preside at such term, and he must give notice of the appointment in such manner as, in his judgment, the public interest requires. The governor may terminate the assignment of the

justice named by him to hold a term appointed pursuant to this section, and may name another justice in his place to hold the same term." (italics ours)

The substantially identical counterpart of *Section 149 Judiciary Law*, namely, *Article 6, Section 27 of the New York State Constitution*, was adopted on November 7, 1961, eff. September 1, 1962. In *haec verba*, it incorporated into the Constitution substantially the same provisions of *Section 149, subd. 1, Judiciary Law*, as aforestated. (App. B, p. 34).

Significantly, there appears to have been no legislative debate, Judicial Conference report, or Bar Association recommendations or discussion regarding the new Constitutional enactment. It simply became part of the new *Article 6* dealing with the Judiciary in general, which created a unified court system, consisting of 38 separate sections of which *Article 6, Sec. 27* was one.

In the absolute power thus vested in the Governor to appoint and to remove at will any judge designated by him to hold the Extraordinary Special and Trial Term of the Supreme Court, both *Article 6, Section 27 of the New York State Constitution* and *Section 149 of the Judiciary Law* are unconstitutional and void, on their very face, as inherently violative of the independence of the judiciary, and the Separation of Powers guaranteed against encroachment by the Due Process Clause of the Fifth and Fourteenth Amendments of the Constitution of the United States and *Article 1, Section 6 of the New York State Constitution*.

The fatal flaw of the statute and constitutional provision in issue is that in its in-built potential of control by the Governor over any judge appointed by him, it is unconstitutional per se.

The cardinal principle laid down by the United States Supreme Court is that the constitutionality of a measure depends not on the degree of its exercise but on its principle. (*Providence Bank v. Billings*, 29 U.S. 514, 7 L.Ed. 399).

In *Stuart v. Palmer*, 74 N.Y. 183, 189, the Court long ago laid down the seminal test of constitutionality:

"The constitutional validity of law is to be tested, not by what has been done under it, but by what may, by its authority, be done."

Again, in *Rosalsky v. State*, 254 N.Y. 117 (1930), the Court stated:

"We measure the validity of statutes, not by what has actually been done under cover of their provisions, but by what with reason may be done. *Stuart v. Palmer*, 74 N.Y. 183, 30 AM Rep. 289; *Matter of Richardson*, 247 N.Y. 401, 421, 160 NY 655."

In *People v. Klinck Packing Co.*, 214 N.Y. 121, 138-139 (1915), the Court reiterated the applicable rule:

". . . we are to judge of a statute by what is possible under it. In the absence of any guide it might very well happen that an administrative officer with the best of purposes would nevertheless be very fallible in the execution of them."

Stuart v. Palmer, supra, has been quoted with approval by this Court in *Montana Co. v. St. Louis Mining & Co.*, 152 U.S. 160, 169 (1894); *Farmer Grain Co. v. Langer*, 273 F.Rep. 635, 647 (CA 8, 1921).

The doctrine of Separation of Powers in our constitutional system of government by checks and balances is a "bulwark against tyranny" (*United States v. Brown*, 381 U.S. 437 (1965)).

Its fundamental tenets are embodied in the Due Process Clause of the State Constitution, *Article 1, Section 6*, no less than in the Fifth and Fourteenth Amendments of the federal Constitution.

In *Still v. Corning*, 15 N.Y. 297, 303, the Court stated:

"The leading feature of the Constitution is the separation and distribution of the powers of the

government. It takes care to separate the executive, legislative and judicial powers, and to define their limits. The executive can do no legislative act, nor the legislature any executive act, and neither can exercise judiciary authority." *Cooley's Constitutional Limitations*, 8th ed. Vol 1, p. 355.

Accord: *Matter of Guden*, 171 N.Y. 529, 531; *People ex rel Burby v. Howland*, 155 N.Y. 270, 288.

The settled law is that a provision in a state constitution is subject to the same statutory rules of construction, consistent with the due process clause of the federal constitution, as any state statute.

In *Matter of Wendell v. Lavin*, 246 N.Y. 115, 123, the New York Court of Appeals declared:

"The same rules apply to the construction of a Constitution as to that of statute law. (*People ex rel Jackson v. Potter*, 47 N.Y. 375, pp. 379-380)."

Accord: *Newell v. People*, 7 N.Y. 9.

"... there is no liberty, if the power of judging be not separated from the legislative and executive powers". (*The Federalist*, No. 78, A. Hamilton, Modern Library ed. P 504). "Upon the state courts, equally with the courts of the Union, rests the obligation to guard and enforce every right secured by the Constitution." (*Holohan v. United States*, 294 U.S. at p. 113).

Accordingly, if Article 6, Section 27 of the New York State Constitution, here in issue, is inherently offensive to the Due Process Clause of the federal and state constitutions, it must be invalidated as unconstitutional and void.

Mr. Justice Cardozo's learned opinion in *People ex rel. SL&T Co. v. Extraordinary Term of the Supreme Court*, 220 N.Y. 487, and in *Matter of Reynolds v. Cropsey*, 241 N.Y. 389 — both cases involving a construction of the very statute in issue herein, in its pre-amended form — emphatically attest to the fun-

damental constitutional questions propounded by the appellant herein.

The gravely pernicious potentials of the statute in issue are readily apparent.

The independence of the judiciary is automatically subjugated to the control, whim and caprice of the Executive. The power to hire and fire a judge puts the Executive implacably "in control of judicial action" (*People ex rel S.L. & T. Co. v. Extraordinary Term*, 220 N.Y. 487).

A judge so compromised would be inevitably impelled to tilt the balanced scales of justice against any accused, if only to curry the favor on the one hand, or avert the retribution of the Governor, on the other. In a court of justice so heavily stacked against the accused, with the Governor holding the strings of both the judge and prosecutor, the elemental rights to a fair trial are hopelessly compromised. No judge so situated could reasonably maintain the balance true, despite the best of intentions and the highest nobility of motive.

To expect any judge or court, so situated, to maintain an even balance of judicial objectivity under these unique and extraordinary circumstances, would be to strain for the fulfillment of the impossible from any human being.

In *re Murchison*, 349 U.S. 133 (1965), the Court stated:

"A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. *But our system of law has always endeavored to prevent even the probability of unfairness.* To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision. Circumstances and relationships must be considered. This Court had said, however, that every procedure which would offer a possible temptation to the average man as a judge . . . not to hold the

balance nice, clear and true between the State and the accused, denies the latter due process of law. 'Tumey v. Ohio, 273 U.S. 510, 532, 71 L.ed. 749, 758, 47 S.Ct. 437, 50 ALR 1243. Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way 'justice must satisfy the appearance of justice.' Offutt v. United States, 348 U.S. 11, 99 L.ed. 11, 75 S.Ct. 11.'" (Emphasis ours)

In *United States v. Walter*, 473 F.2d 136 (CA, D.C. (1972), the Court noted:

"The disciplined judicial mind should not be subjected to any unnecessary strain; even the most austere intellect has a subconscious."

With the utmost deference and the highest respect and esteem for the distinguished appellee Justice, the Hon. John M. Murtagh, the extraordinary pressures subtly operative against any judge so situated could not but have been reflected in the conduct of trial in the cases before the Extraordinary Term of the Supreme Court. The reported decisions of appellate tribunals in corrective action graphically portray the predicament in which defendants have been placed under the unconstitutionally structured statutes at bar. e.g., *People v. Johnson*, 46 App.Div.2d 123, 127 (1975); *People v. Bell*, 45 App.Div.2d 362, 364, affd by New York Court of Appeals (*N.Y. Times*, Nov. 20, 1975; *People v. Harding*, 33 App.Div.2d 800 (1974); *People v. Levy*, 47 App.Div. 2d 12 (1975); *People v. Mackel*, 47 App.Div.2d 209 (1975).

Granted that the appellee Justice has displayed commendable judicial impartiality and fairness in several recently reported cases on jurisdictional issues (*Matter of Goldman*, —Misc. 2d— (1975); *People v. Geller*, —Misc. 2d—, *New York Times*, Nov. 18, 1975, p. 61, the fact is nevertheless that this indictment had been originally spawned against appellant under color of the unconstitutional statutes in issue. Further, the

ultimate test of constitutionality is that the statute must be judged "by what is possible under it" (*Stuart v. Palmer*, 74 NY 183, quoted with approval by this Court in *Montana Co. v. St. Louis Mining Co.*, 152 US 160, 169 (1894); *Farmer Grain Co. v. Langer*, 273 F.Rep. 635 (CA 8, 1921)).

That this question is so substantial as to require plenary consideration by the Supreme Court of the United States for its resolution is readily attested by the fact that the state statute in issue is an identical replica of the tyrannical power exercised by King George III over the colonial governments, through his royal governors, by systematically appointing and controlling his own judges and prosecutors. "He has made Judges dependent on his Will alone, for the tenure of their offices,***" (*Declaration of Independence, July 4, 1776*).

It matters not that the unfettered power thus vested in the Governor springs from the highest motives in the rooting out of a festering corruption within the criminal justice system. "Even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." (*NAACP v. Alabama*, 377 U.S. 288, 307).

United States ex rel. Monty v. McQuillan, 385 F.Supp. 1308 (EDNY 1974), affd. 516 F.2d 897 (CA 2, 1975), and *People v. Davis*, 67 Misc.2d 14, cited by appellee Nadjari, are both totally inapposite. (Motion to Dismiss, pp. 7-9). The issue presented in these cases was strictly limited to the Governor's prescribed statutory power to designate a particular judge under Section 149, subd. 1, Judiciary Law (App. 36), without more. No challenge was made therein, however, to the Governor's unconstitutionally delegated power to terminate the assignment of the justice appointed by him, by dictatorial fiat at any time, and to appoint another justice in his place to hold the same term.

Again, appellee Nadjari misleadingly quotes the Cardozo court in *People ex rel. Saranac Land & Timber Co. v. Extraordinary Term of Supreme Court*, 220 NY 487, 492 (1917), as

follows: "Aside from the power to assign and remove the justice, the Governor 'has no power to do more', and he 'has not attempted to do more'." The fact is, however, that the power to remove the justice was added to the statute in issue long after the Cardozo court had rendered its decision in the *Saranac* case.

The appellee blandly asserts to this Court that "the additional power of the Governor to terminate the assignment and name another justice to hold the term is one of necessity, occasioned by the possibility that a presently assigned justice may become unable or unwilling to continue his position" (Motion to Dismiss, p. 9). This is to disregard the critical fact that in no other case is the Governor given the absolute judicial power to play musical chairs with the assignment of judges of the Supreme Court, a matter strictly reserved to the Appellate Division alone under New York's Judiciary Law (App. B, pp. 35-36).

Appellee Nadjari erroneously contends that "the federal separation of powers doctrine does not apply to the states", citing *Dreyer v. Illinois*, 187 US 71, 84 (1902). (Motion to Dismiss, p. 10). In that case, however, this Court plainly stated:

"Whether the legislative, executive and judicial powers of a state shall be kept *altogether* distinct and separate, or whether persons or collections of persons belonging to one department may, *in some respect to some matters*, exert powers which, strictly speaking, pertain to another department of government, is for the determination of the state." (Emphasis supplied)

In other words, *Dreyer v. Illinois* stands for the proposition that a mere overlapping of some powers is not necessarily violative of the separation of power doctrine. Said the Court:

"The true meaning is, that the *whole power* of one of these departments should not be exercised by the same hands ***" (Emphasis supplied).

In conferring upon the Governor the whole power to appoint and to terminate the tenure of judges' assignments, the en-

croachment by the executive over the judiciary has thereby transcended all constitutional limits.

POINT II

SECTION 149, SUBDIVISION 2 OF THE JUDICIARY LAW, IN SUBSTANTIALLY DIMINISHING THE RIGHTS OF LITIGANTS BEFORE THE EXTRAORDINARY TERM, IS UNCONSTITUTIONAL AND VOID ON ITS FACE, AS INHERENTLY VIOLATIVE OF THE EQUAL PROTECTION OF THE LAWS AND DUE PROCESS OF LAW.

Gravely compounding the evil potentials of *Section 149 Judiciary Law*, a further amendment of the same statute also destroyed the equal protection of the laws for all litigants in the Appellate Court by severely diminishing their pre-trial procedural rights to a fair and impartial trial (*cf. People ex rel. S.L. & T. Co. v. Extraordinary Term*, 220 N.Y. 487, per by Judge Cardozo; *Matter of Cropsey, supra*).

Originally, every defendant at the bar of the Extraordinary Term had the absolute right to present any pretrial motion, viz., to disqualify a judge for bias, to apply for a change of venue, to waive a jury trial, to suppress illegal evidence, etc., to the Special Term of the Supreme Court, rather than exclusively to the Extraordinary Term.

Subsequently, however, the legislature amended *Section 149 of the Judiciary Law*, by enacting a new *subdivision 2* (L. 1953, Ch. 890), substantially diminishing the rights of litigants, as follows:

"2. A motion involving a matter pending before such extraordinary special or trial term shall be made returnable at such term, or, at the option of the moving party, at a term of the appellate division of the supreme

court in the department in which such extraordinary special or trial term is being held."

However, the statute was once again amended by L. 1960, ch. 164. In place of the saving absolute "option" accorded criminal defendants to make all motions returnable in the appellate division in the supreme court, the new amendment massively diminished the rights of litigants still further by substituting for it the discretionary device of a justice of the appellate division. The amended statute in its present form, now reads as follows:

"2. A motion involving a matter pending before such extraordinary special or trial term shall be made returnable at such term, except that, in the exercise of discretion, a justice of the appellate division of the supreme court in the department in which such extraordinary special or trial term is being held may grant permission for such motion to be heard at a term of such appellate division." (App. p. 36).

In *Roller v. Holly*, 176 U.S. 398, 409, 44 L. ed. 520, 524, 20, this Court held:

"The right of a citizen to due process of law must rest upon a basis more substantial than favor or discretion."

Above all, this appellant, as all others similarly situated before the Extraordinary Term, have been deprived of the fundamental right to be tried by a judge randomly chosen. Appellant is now compelled to stand trial before the Governor's personally hand-picked judge and hand-picked Special Prosecutor, both of whom are summarily removable at the instance, will, whim, or caprice of the Executive, in flagrant violation of the principle of separation of powers. By comparison, all other defendants in the regular criminal terms are entitled to assignment of judges selected at random (*Rule 751.5 Supreme Court Rules, Kings County*), and removable only by the Appellate Division, and no other.

In net effect, under the amended statute aforesaid, a litigant is absolutely restricted to the respondent Extraordinary Term

alone for vindication of his rights of due process to a fair and impartial trial, save only for the limited right to apply to the Appellate Division with respect to preliminary matters, subject however, to the over-all discretionary right of a justice of the Appellate Division to grant or withhold such permission (*Section 149, subd. 2 Judiciary Law*).

A defendant before any regular term of the Supreme Court, however, would have the absolute right to move at Special Criminal Term for disqualification of the presiding judge, for a change of venue, or for dismissal of the indictment on due process grounds. These fundamental rights are absolutely denied to all defendants before the appellate court. Even the fixation of excessive bail by the appellee Extraordinary Term is not subject to habeas corpus relief before an independent justice presiding at the regular Special Term of the Supreme Court, as is accorded all other defendants in the regular criminal terms (*People ex rel. Feldman v. Warden*, 45 App. Div. 2d 838 (1st Dept., 1974)).

In practical terms, particularly prejudicial to appellant, he would be seriously hard put to avail himself of the fundamental right of waiver of jury trial in the appellate court — especially where, as here, the appellate division below had already definitively determined from inspection of the Grand Jury Minutes that "the theory underlying the charge of grand larceny is thin and the proof in regard thereto quite tenuous." [*Matter of Moritt v. Nadjari*, 46 AD 2d 784 (2d Dept.)]. Accordingly, if the *ex parte* evidence adduced before the Grand Jury by the appellee Nadjari is of that meager quality, then clearly the trial evidence to be adduced on behalf of the appellant would inevitably require and justify a trial order of dismissal for legal insufficiency of the evidence under New York's Criminal Procedure Law, Sec. 290.10.

Nevertheless, for the reason aforesaid directly affecting the independence and impartiality of the judiciary (Point I), the appellant is now effectively foreclosed from a free choice of

waiver of jury trial in the appellee court under the unique circumstances herein presented.

Again, in sharp contrast to the fixed general rule in the appellate division that "a motion or proceeding will be deemed submitted to the court without oral argument", all other defendants at the bar of the regular criminal terms of the Supreme Court are by court rule granted the important right to argue orally all contested motions. (Rules Sec. 670.3(b) Supreme Court Rules Kings County, 22 NYCRR, Sec. 752.11). Here, appellant had been denied a fair and equal opportunity to argue his original motion to that Court submitted under color of Section 149 subd. 2 of the Judiciary Law.

It will be noted that even in a meritorious application to disqualify the presiding justice for bias or interest, there would be no other justice to take his place, for there is but a single judge appointed by the Executive to preside in the Appellee Court, the Extraordinary Term of the Supreme Court. To replace that justice for bias or interest would necessarily entail that the Governor designate an alternate judge in his place by new executive order in each such case, thus superimposing a serious practical road block in the path of any defendant at the bar of the Extraordinary Term, to the equal protection of the laws, as compared to all other defendants within the jurisdiction of the regular criminal terms of the Supreme Court.

As to the alternate discretionary right of any defendant to apply to the Appellate Division for permission to file a pre-trial motion or proceeding, authorized by Sec. 149 Judiciary Law, subd. 2, it is hornbook constitutional law that a grant of discretion is no fair or adequate substitute for the absolute right accorded all other defendants in the regular criminal terms to institute all pre-trial proceedings at an independent term. (*Roller v. Holly*, 176 U.S. 398, 409).

It will be noted, in this connection, that although the Appellate Division had denied appellant's application to dismiss the indictment for gross prosecutorial misconduct shocking to the conscience, *without a hearing*, a complaint subsequently filed by Judge Moritt under Title 42 USC 1983 for deprivation of civil rights, pleading the identical acts alleged in the state court

proceedings hereinabove, was subsequently upheld by Chief Judge Mishler in the U.S. District Court for the Eastern District of New York, on Appellee Nadjari's motion to dismiss. (*Moritt v. Nadjari*, et al. — F. Supp. — August 27, 1975).

In sum, every litigant at the bar of criminal justice before the appellee Extraordinary Special and Trial Term of the Supreme Court is effectively deprived of the equal protection of the laws accorded all other criminal defendants in the regularly constituted terms of the Supreme Court.

The appellees contend that "the use of sound judicial discretion is not uncommon to state or federal courts in setting bail, imposing sentence or granting leave to appeal, or this Court in granting certiorari." (Motion to Dismiss, p. 12).

We respectfully submit, in answer, that since the normal exercise of discretion is and should be universally applicable to all criminal defendants alike, the absolute discretion vested in the appellate division to grant or deny an application to entertain pretrial motions is intrinsically violative of appellant's right to the equal protection of the laws accorded to all other defendants of the Criminal Term of the Supreme Court, who are limited by no such discretion in their right to pretrial relief.

POINT III

THE GOVERNOR'S SPECIFIC DESIGNATION OF THE APPELLEE NADJARI TO MANAGE AND CONDUCT ALL PROCEEDINGS IN THE EXTRAORDINARY TERM OF THE SUPREME COURT RENDERED SECTION 63 EXECUTIVE LAW AND EXECUTIVE ORDER NO. 58 UNCONSTITUTIONAL AND VOID, AS APPLIED, UNDER THE DUE PROCESS CLAUSE OF THE CONSTITUTION.

The personal designation of the prosecutor by the Governor infinitely compounded the threat against the independence of the judiciary, by arrogating unto the Executive, likewise, the constitutional functions of the quasi-judicial, independently-elected office of appellee Attorney General of the State of New York (Article 5, Sec. 1 New York State Constitution), and

flagrantly violated the specific mandate of Section 63 of the Executive Law of New York that the Attorney General "attend in person, or by one of his deputies" before the Extraordinary Term.

Section 63 Executive Law, implementive of and complementary to Section 149 Judiciary Law aforesaid, provides in pertinent part as follows:

"Section 63. General Duties. The Attorney General shall:

1. Prosecute and defend all actions and proceedings in which the state is interested, and have charge and control of all the legal business of the departments and bureaus of the state, or of any office thereof which requires the services of attorney or counsel, in order to protect the interests of the state***.

2. Whenever required by the governor, attend in person, or by one of his deputies, any term of the supreme court or appear before the grand jury thereof for the purpose of managing and conducting in such court or before such jury criminal actions or proceedings as shall be specified in such requirement***." (Emphasis ours.)

Notwithstanding the explicit requirement contained in Section 63 Executive Law that the Attorney General "attend in person, or by one of his deputies", the fact that the Governor personally and officially directed the Attorney General to appoint the appellee Nadjari is a matter of common knowledge of which the Court may properly take judicial notice. (*Hunter v. New York, Ont. & West. RR Co.*, 116 NY 615; 20 Amer. Jur. Evid. Sec. 23;

By designating his own Special Prosecutor to manage and conduct all proceedings in the court so controlled by the Executive as aforesaid, the Governor has not only magnified the potential dangers of Section 149 Judiciary Law to the independence of the judiciary and to the due process rights of an accused, but has likewise rendered Section 63 Executive Law

and Executive Order No. 58 issued thereunder, unconstitutional and void, as applied, under the Due Process Clause of the Constitution.

The unchecked power vested in the Governor by Section 149 Judiciary Law to appoint the Justice presiding in the appellee Court and to remove him at will, for any cause or no cause — and, in the very context of such a controlled court, to sanction the right of the Governor to hand-pick and control the designation of a particular Special Prosecutor to manage and conduct all proceedings therein — would tend to invite and encourage the very tyrannical abuses practiced by the appellee Nadjari at bar, not only against this appellant but against a host of others similarly situated, as reflected in a proliferating number of reported cases.

It is no mere coincidence that, under goad of a court structure so wholly controlled by the Executive, that an abnormal number of defendants at the bar of the appellee court have been compelled to interpose special defenses charging appellee Nadjari with wilful entrapment, subornation of perjury, prosecutorial misconduct shocking to the conscience, refusal to arraign defendants at any time following arrests, lack of jurisdiction, and notoriously unfair trial tactics. (See *United States v. Archer*, 486 F.2d 670 (CA2); *People v. Steinman*, 44 App. Div. 2d 839 (2d Dept. 1974); *Matter of Klein v. Murtagh*, 44 App. Div. 2d 465 (2d Dept. 1974); *People v. Mackel*, 47 App. Div. 2d 209 (1975); *Matter of Goldman*, — Misc.2d — (1975); *People v. Geller*, — Misc. 2d —, N.Y. Times, Nov. 18, 1975, p. 61); *People v. Levy*, 47 App. Div. 2d 12 (1975); *People v. Bell*, 45 App. Div. 2d 362 (1st Dept.); *People v. Johnson*, 46 App. Div. 2d 123, 127 (1975); *Lopez v. Nadjari*, U.S.D.C., E.D.N.Y. 1974 (Civil suit for illegal wiretapping of telephone conversation between attorney and client); *People v. Harding*, 44 App. Div. 2d 800 (1st Dept.).

In *People v. Nigrone*, 46 App. Div. 2d 343 (2d Dept. 1975), the Court unequivocally remarked of appellee Nadjari: "Such a perversion of the criminal justice system by an overzealous prosecutor is illegal, outrageous and intolerable and we con-

demn it." In similar vein, federal Judge McMahon recently characterized appellee Nadjari's mispractices as "foul, illegal and outrageous." (*Rao v. Nadjari*, — F Supp —, USDC, SD N.Y. (October 2, 1975).

In sum, we respectfully submit that *Section 63 Executive Law* and *Executive Order No. 58* are unconstitutional and void, as applied, under the Fifth and Fourteenth Amendments of the Constitution of the United States and Article 1, Sec. 6 of the New York State Constitution.

A statute may be deemed unlawful and unconstitutional, as applied. (*Steffel v. Thompson*, 415 US 452, ff. 7, (1974); *Younger v. Harris*, 401 US 37; *Samuels v. Mackell*, 401 US 66; *Sands v. Wainwright*, 491 F. 2d 417 (CA 5, 1973).

The appellees Nadjari, as well as the Attorney General, have studiously avoided denying or controverting Appellant's due process contention that the Governor's personal designation of Nadjari to manage and conduct all proceedings in the unconstitutionally structured court likewise rendered *Section 63 Executive Law* and *Executive Order 58* unconstitutional and void, as applied.

The appellees glibly fob off this contention by merely stating that any argument "that the Governor's designation of the Attorney General was improperly executed is again an attack on an act, not a statute." (Motion to Dismiss, p. 13).

The fact is, however, as alleged in the Article 78 state proceeding below, the Governor had in fact personally designated the appellee Nadjari as a Special Deputy Attorney General to manage and conduct the proceedings in the Governor's own handpicked court—in flagrant violation, not only of the independence of the judiciary, but also of the independence and autonomy of the constitutionally-elected office of Attorney General. If so, then appellant's right to due process of law has been immeasurably compromised.

Neither appellee Nadjari nor the Attorney General have

candidly faced up to this central issue in their submission either to this Court, or in the State courts below.

In *Field v. Boyle*, 503 F2d 774 (1974), the Court stated:

"*** due process questions under the Federal Constitution may be presented either by the failure of a state to follow its own rules of law or by state rules of law themselves serving as a deprivation of due process".

This Court has held that:

"The history of American freedom is in no small measure the history of procedure." (*Malinski v. New York*, 324 U.S. 401, 419)

POINT IV

THE INDICTMENT IS UNCONSTITUTIONAL AND VOID AS EX POST FACTO.

To permit a prosecutor to engage in an *ex post facto* prosecution of this nature would directly undermine the fundamental independence of the judiciary with respect to the traditional official relationship subsisting between a judge and his law assistant in the regular performance of judicial duties, upon which this appellant and all other judges in the unified court system have relied. If this appellant be rendered retroactively vulnerable to the harassment and threat of a criminal prosecution over a matter strictly within the exclusive jurisdiction of the judiciary, then every judge or his law assistant in the land could be no less in jeopardy at the hands of a wilful and malicious prosecutor. Every judge and his law assistant would be hostage to the design of an ambitious, overzealous or tyrannical prosecutor. A state cannot, by judicial decision or otherwise, remove any of its activities from the inhibitions of the 14th Amendment. (*City of St. Petersburg v. Alsup*, 238 F.2d 830, cert. den. 353 US 922).

A law that makes an action done before its enactment criminal, and which was innocent when done, is *ex post facto*. *Calder v. Bull*, 3 U.S. 386 (1798); *Bouie v. Columbia*, 378 U.S. 347, 353 (1964); *United States v. Nill*, 518 F.2d 793 CA 5, 1975). The criminal statutes of grand larceny and conspiracy, as here applied against appellant, are clearly invalidly retroactive and an *ex post facto* exercise of jurisdiction. *Williams v. United States*, 179 F.2d 644, aff. 341 US 70; *Love v. Fitzharris*, 460 F.2d 382, vacated 409 US 1100).

The indictment procured by the appellee Nadjari against appellant usurped the exclusive jurisdiction of the administrative supervision of the courts, as provided for by *Article VI, Section 28 New York State Constitution*, and as implemented by *Article 7A Judiciary Law*, more particularly *Sections 212 and 222* thereof relating to "personal practices, title structure, job definition, classification, qualifications, appointments, promotions, transfers, leaves of absence, resignations and reinstatements, performance rating, sick leaves, vacations, time allowances and removal of non-judicial personnel of the unified court system", and in accord with long-standing tradition and standard practice thereunder, upon which the Appellant, Judge Moritt, relied.

Pursuant to the mandate of the Constitution, the legislature enacted laws implementing the Constitution with *Article VII A Judiciary Law*, more particularly *Section 212* which provides:

"The administrative board shall have the authority and responsibility for the administrative supervision of the unified court system. In discharge of that authority and responsibility the administrative board, in consultation with the judicial conference, may adopt, amend, rescind and make effective standards and policies for general application throughout the state,***"

Section 212 of the Judiciary Law, subd. 1, provides in part:

"1. *Personnel practices, title structure, job definition, classification, qualifications, appointments,*

*promotions, transfers, leaves of absence, resignations and reinstatements, performance rating, sick leaves, vacations, time allowances and removal of non-judicial personnel of the unified court system. **** Before adopting new standards and policies which affect the non-judicial personnel, the administrative board shall give notice of the proposed new standards and policies and shall give notice of and hold a hearing at which affected employees or their representatives shall have the opportunity to submit criticisms, objections, and suggestions relating to such proposed standards and policies."

The administrative board has placed only one restriction upon the appointment of personal assistants (secretary) to the justices, to wit, that said personal assistants shall be attorneys, but has not imposed any other requirements or restrictions as set forth in *subdivision 1 of Section 212 Judiciary Law*.

Appellant relied upon the law as aforesaid in engaging Theodore Mann, an attorney, as his secretary and complied fully with its mandates.

In *Matter of Spindel v. Dudley* (unreported), Supreme Court, New York County, New York Law Journal, June 4, 1974, the Court stated:

"For the nature of the Secretary's work is wholly defined by the individual Justice, and is to a large extent unrelated to a five-day week, eight-hour schedule. The Secretary may be as much on the job when at home, actually ill, but reading and evaluating briefs, papers in the court file, decisions and precedents, or conferring with the Justice by telephone, as when he is physically present in chambers."

Indeed, in conclusive confirmation of appellant's contention herein, the appellee Nadjari had publicly declared and acknowledged that the employment of alleged "no-show Law Secretaries to Justices of the Supreme Court" "is not an indictable

crime" with respect to the "rip-off" salaries paid to them, because "we need new legislation for that." (*New York Daily News*, December 19, 1974).

POINT V

THE CONSTITUTIONAL QUESTIONS PRESENTED IN THIS APPEAL ARE SUBSTANTIAL.

As is plainly manifest, each of the constitutional issues presented in this appeal are substantial (*Zucht v. King*, 260 US 174, 177; *Rule 15(e) Rules of the Supreme Court*).

In dismissing the appeal taken as of right under New York law pursuant to Civil Practice Law and Rules 5601(b), on the purported ground that "no substantial constitutional question is directly involved" and in summarily denying the appellant leave to appeal, the Court of Appeals failed to adhere to its standard precedents laid down in its own prior decisions in *People ex rel S.L. & T. Co. v. Extraordinary Term of the Supreme Court*, *supra*, Cardozo, J. and in *Matter of Reynolds v. Cropsey*, *supra*, construing the very statute here in issue in its preamended form. It was after the Cardozo decision in *Saranac* that the legislature made the statute repugnant to the Constitution by enacting new legislation allowing the Governor to remove as well as appoint the special judge of the Governor's own creation. As so reconstituted, it is self-evident that the legislative authorization granted to the Governor to terminate the assignment of a justice appointed by him at will, would never have survived constitutional muster of the Cardozo court.

With all due deference and the utmost respect for the New York Court of Appeals, a state court cannot so construe a state statute as to render it obnoxious to the Federal Constitution. (*Arizona Employer Liability Cases*, 250 US 400; *Crew Levick Co. v. Comm. of Pa.*, 245 US 292). The Supreme Court of the United States is not bound by the determination of the New York Court of Appeals that the constitutional questions are not substantial,

but must reach a conclusion independent of the state court. (*Appleby v. City of New York*, 271 U.S. 364; *Napue v. Illinois*, 360 US 264; *Brookhart v. Janis*, 86 S. Ct. 1245; *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697).

The judgment appealed from herein is a final judgment within the meaning of 28 U.S.C. 1257 (*Gospel Army v. Los Angeles*, 331 U.S. 543, 548; *Dept. of Banking v. Pink*, 317 U.S. 264, 268; *Richfield Oil Corp. v. State Board*, 329 U.S. 69, 72).

Notwithstanding that the constitutional validity of the state statutes here in issue are now technically pending before the appellees Judge Murtagh and his Extraordinary Term of the Supreme Court as aforesaid, it is plain that appellant's contentions as to the facial invalidity of Section 149 Judiciary Law go to the very jurisdiction of the unconstitutionally structured Court. If this statute is inherently violative of the independence of the judiciary, then the appellee Court is utterly without jurisdiction or legal competence to resolve the issue of constitutionality or otherwise as a legally constituted Court (*Oakley v. Aspinwall*, 3 N.Y. 547; *Wilcox v. Royal Arcanum*, 210 N.Y. 370, 377; *People v. Whitridge*, 144 App. Div. 493 (N.Y. 1st Dept). The one and only Court properly exercising jurisdiction or legal capacity was the Appellate Division of the Supreme Court below, to which appellant had vainly addressed the proceeding appealed from herein.

In practical terms as well, it would be patently incongruous to beseech the appellees Judge Murtagh and Extraordinary Term of the Supreme Court for a ruling which would enseat the invalidity of the Court's own very existence, and pronounce its own nullity as a legally constituted court; "There can, of course, be no valid prosecution and conviction for crime unless the court in which the prosecution is instituted or carried on is legally created and constituted, or is at least a de facto court." (22 *Corpus Juris Secundum* 108, pp. 299-300).

CONCLUSION

The motion to dismiss the appeal should be denied. The constitutional questions presented herein are so substantial and are of such grave public importance as to require plenary consideration with briefs on the merits and oral argument for their resolution.

Respectfully submitted,

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